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MICHIGAN REPORTS.

REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF MICHIGAN

FROM

JANUARY 23, 1877, TO JUNE 12, 1877.

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SUPREME COURT OF MICHIGAN.

THOMAS M. COOLEY, Chief Justice.

JAMES V. CAMPBELL,
ISAAC MARSTON,
BENJAMIN F. GRAVES, } Associate Justices.

OTTO KIRCHNER, Attorney General.

CIRCUIT JUDGES.

FIRST CIRCUIT,
DANIEL L. PRATT.

SECOND CIRCUIT,
HENRY H. COOLIDGE.

THIRD CIRCUIT,
CORNELIUS J. REILLY.

FOURTH CIRCUIT,
GEORGE M. HUNTINGTON.

FIFTH CIRCUIT,
PHILIP T. VAN ZILE.

SIXTH CIRCUIT,
AUGUSTUS C. BALDWIN.

SEVENTH CIRCUIT,
JOSIAH TURNER.

EIGHTH CIRCUIT,
LOUIS S. LOVELL.

NINTH CIRCUIT,
JOSIAH L. HAWES.

TENTH CIRCUIT,
WILLIAM S. TENNANT.

ELEVENTH CIRCUIT,
DANIEL GOODWIN.

TWELFTH CIRCUIT,
WILLIAM D. WILLIAMS.

THIRTEENTH CIRCUIT,
REUBEN HATCH, JR.

FOURTEENTH CIRCUIT,
MICHAEL BROWN.

FIFTEENTH CIRCUIT,
¹DAVID THOMPSON.

SIXTEENTH CIRCUIT,
EDWARD W. HARRIS.

SEVENTEENTH CIRCUIT,
BIRNEY HOYT.

EIGHTEENTH CIRCUIT,
SANFORD M. GREEN.

NINETEENTH CIRCUIT,
HARRISON H. WHEELER.

TWENTIETH CIRCUIT,
DAN J. ARNOLD.

TWENTY-FIRST CIRCUIT,
HENRY HART.

JUDGE OF THE SUPERIOR COURT OF DETROIT,
LYMAN COCHRANE.

JUDGE OF THE SUPERIOR COURT OF GRAND RAPIDS,
JOHN T. HOLMES.

RECORDER OF THE CITY OF DETROIT,
GEORGE S. SWIFT.

¹ Appointed March 1, 1877, vice Edwin W. Kelghtley resigned.

TABLE OF CASES

REPORTED IN THIS VOLUME.

	PAGE.
ALLEN, WILCOX v.	160
ALLISON v. CONNOR. <i>Fraud: Indivisible cause of action:</i> <i>Settlement.—Charge to the jury.</i>	283
AMERICAN CIGAR COMPANY v. FOSTER. <i>Chattel Mortgages:</i> <i>Future acquisitions: Filing.—Valid as between the parties:</i> <i>Purchaser with notice.</i>	368
AMERICAN INSURANCE COMPANY v. CUTLER. <i>Promissory</i> <i>notes: Illegal Consideration: Presumptions.</i>	261
ARMITAGE v. WIDOE. <i>Contracts: Assent.—Adopting unauthor-</i> <i>ized acts of another: Agency: Authority.—Infancy: Attor-</i> <i>ney: Ratification.—Gifts: Benefit to infant: Presumptions:</i> <i>Acceptance.—Gift of a contract: Consideration paid: Re-</i> <i>putation.—Voidable contract: Disaffirmance.</i>	124
ATKINSON v. SCOTT. <i>Land contracts: Conveyance by vendor</i> <i>to third person: Rescission: Consideration paid.—Money</i> <i>had and received: Equitable action.—Question of fact: Con-</i> <i>flict of evidence: Taking question from jury.</i>	18
ATTORNEY GENERAL v. BRADLEY.	447
AUDITOR GENERAL, HOUGHTON COUNTY v.	271
AUDITOR GENERAL v. SUPERVISORS OF MONROE COUNTY. <i>State and county: Taxation: Taxes returned as delinquent.</i> <i>—Taxes: Accounting with the state: Delinquent taxes:</i> <i>Payment.—Statute construed: Retroactive effect: Collection</i> <i>of taxes: Title.—State tax-bids: Accounts between county</i> <i>and state.—Injunctions.</i>	70
AURORA FIRE AND MARINE INS. CO. v. KRANICH. <i>Insurance:</i> <i>Proofs of loss: Time: Waiver.—Policy: Default: For-</i> <i>feiture: Construction.—Vacancy of premises: Renewals.—</i> <i>Notice.</i>	289
AU SABLE RIVER BOOM CO. v. SANBORN. <i>Payment: Debtor's</i> <i>acceptances: Agreement.—Boom companies: Lien on logs:</i> <i>Delivery: Acceptances: Lien on residue of logs: Waiver.—</i> <i>Lien on logs retained for dues on logs delivered: Bona fide</i> <i>purchaser.</i>	358

	PAGE.
AUSTIN v. FRENCH. <i>Mortgages: Foreclosure: Personal property: Receiver: Replevin.—Chattel mortgages: Sufficiency of description: Question of law.—Description: Foreclosure suit.</i>	199
BACON, HANOLD v.	1
BAILEY v. BAILEY. <i>Ejectment: Evidence: Death: Circumstances: Absence: Inquiries.—Life: Presumptions: Circumstantial evidence.—Undivided interest: Ouster.</i>	181
BARBER v. RORABECK. <i>Homestead: Exemption: Construction.—Farm: Extension of village limits.</i>	399
BARDEN v. BRISCOE. <i>Statute of frauds: Promise to pay debt of another.—Money had and received: Indebtedness to third person: Evidence.—Relevancy: Plaintiff's own theory: Rulings that do not prejudice.—Arguments to the jury: Opening argument: Reply: Discretion.</i>	254
BARMAN, LIEBERMAN v.	380
BAY CITY BRIDGE CO. v. VAN ETTEN. <i>Equity jurisprudence: Suit to recover moneys wrongfully appropriated: Corporations: Officers.—Accounting: Appropriation of corporate funds: Remedy at law.—Questions for jury.—Demurrer: Amount.</i>	210
BAY CITY COMMON COUNCIL, FENNEL v.	186
BEESON, JONES v.	214
BENDER, BURNS v.	195
BIGGAM, HORNER v.	243
BILLS v. KEESLER. <i>Chattel mortgages: Certified copy: Evidence: Form of certificate.—Certificates: Form.</i>	69
BOTTOMLEY v. GOLDSMITH. <i>Promissory notes: Purchaser: Notice that payee deals in liquors: Inquiry: Consideration.—Unlawful sale of liquors: Bona fide purchaser: Burden of proof.—Secondary evidence: Contents of letter: Loss: Prima facie case.—Intoxicating liquors: Special questions to jury.—Requiring jury to withdraw.</i>	27
BOWEN v. CULP. <i>Executions: Receivers: Joint liability: Non-joinder: Plea in abatement.—Offer to turn out the property: Executions: Return day: Sales.—Demand: Officer: Authorized person.—Promise to pay executions: Statute of frauds: Evidence: Charge to the jury.</i>	224
BOWEN v. SCHOOL DISTRICT NO. 9 OF RUTLAND. <i>School district order: Used as money: Implied promise: Waiving tort and bringing assumpsit.—Agency: Admission: Evidence.—Clerk: Payment: Authority.—Interest: Trifling sum.</i>	149
BOYNTON, GILLAM v.	236
BRADLEY, PEOPLE v.	447
BREESE, SLATER v.	77
BRISCOE, BARDEN v.	254

	PAGE.
BROOKS v. FAIRCHILD. <i>Deeds: Irregularities: Defects: Curative act of 1861.—Ejectment: Value of premises: Filing request nunc pro tunc: Discretion.—Evidence: School districts: Boundaries.—Special questions to the jury.</i>	231
BROWN v. MCHUGH. <i>Promissory notes: Defense: Prohibitory liquor law: Finding of facts.—Judgment: Conjecture: Illegality: Presumptions.—Intoxicating liquor.</i>	433
BROWN v. PEOPLE. <i>Rape: Complaints of prosecutrix.—Force: Resistance: Consent.—Charge to the jury: Yielding: Assent.—Hypothesis not supported by evidence.</i>	203
BROWNELL v. GROESBECK. <i>Hearsay evidence: Ex parte presentation: Practice.</i>	501
BRUSH, LOOMIS v.	40
BUCHOZ v. PRAY. <i>Estates of deceased persons: Commissioners on claims: Contingent claims: Appeal: Remedy.—Statutes construed.—Hear and report proofs.</i>	429
BURNS v. BENDER. <i>School districts: Disbursement of school moneys: Assessor: Treasurer: District officers.—Town treasurers: District moneys: Disbursement: Transfer to assessor: Moderator.—School moneys: Warrant: Mandamus: Relator.—Payments.—Double functions: School moderator: Duty.</i>	195
CADWELL v. RANDALL. <i>Contracts: Construction: Conditions precedent: Performance.</i>	251
CALHOUN COUNTY SUPERVISORS, STETSON v.	10
CALKINS v. CHANDLER. <i>Contracts: Promise to forbear: Consideration: Indefinite time: Declaration.—Promise to pay debt of another: Statute of frauds.—New consideration.—Forbearance: Promise to withhold money for plaintiffs.</i>	320
CANPAU v. PROBATE JUDGE OF ST. JOSEPH COUNTY. <i>Mandamus: Petition for administration: Probate court: Remedy.</i>	500
CARPENTER, HART v.	402
CARPENTER v. VAIL. <i>Line fences: Penalties: Conditions precedent: Finding of facts.—Adjoining proprietors: Occupant: Husband and wife.</i>	226
CARTER v. CARTER. <i>Indefinite employment: Statute of limitations.—Evidence: Value of services.</i>	207
CHANDLER, CALKINS v.	320
CHICAGO & N. E. R. R. CO., MORGAN v.	428
CLARK v. STILSON. <i>Contract: Construction: Mortgage: Agreement to release in part.—Foreclosures: Sales in parcels: Right to redeem: Waiver.—Amicable arrangement: Defective foreclosure: Costs of new foreclosure.—Vendor's lien: Judgment: Amount: Execution sale: Release.—Equitable mortgage.—Purchaser's title.</i>	482
CLOUGH, KANE v.	436

	PAGE.
COLDWATER v. TUCKER. <i>Municipal corporations: Exercising powers beyond their limits.—Cities: Contracts: Public works outside their limits.—Sewerage: Extension beyond city limits: Necessity: Implied authority.—Sewers: Outlet beyond city limits: Discretion.—Drainage: Outlet: Contract to extend and enlarge ditch: Corporate powers.—Construction: Extraordinary and unexpected floods.—Neglect in repairs: Arbitration: Damages: Forfeiture.—Injunction: Drainage: Obstruction.</i>	474
COLUMBUS, STALEY v.	38
COLWELL v. KEYSTONE IRON CO. <i>Sales: Delivery: Lumber: Measurement: Inspection: Title.—Agency: Two principals: Acceptance of delivery.—Transfer of possession: Contract of sale: Revocable bailment.</i>	51
COMMON COUNCIL OF BAY CITY, FENNEL v.	186
COMSTOCK v. NORTON. <i>Evidence: Orders: Payment by plaintiff at defendant's request: Corroboration: Relevancy.—Charge to the jury: Hypothesis of the parties.—Statute of frauds: Promise to pay debt of another.—Hypothesis unsupported by evidence.</i>	277
CONNOR, ALLISON v.	283
CONTINENTAL INS. CO., REYNOLDS v.	131
CORBITT, FINN v.	318
COVELL, HEYMANN v.	157
COVELL v. TREASURER OF KENT COUNTY. <i>Juror's fees: Superior court of Grand Rapids: Kent county.—Legislative authority.—Constitutional law: Municipal courts.—Jurisdiction.</i>	332
CRAPO v. SEYBOLD. <i>Sales: Growing wheat: Payment in oats: Credit.—Replevin: Undivided interest: Wheat in shocks.</i>	444
CULP, BOWEN v.	224
CURKENDALL v. PEOPLE. <i>Curtilage: Dwelling house: Barn: Separated by public highway.</i>	309
CURTENIUS, TRIPP v.	494
CUTLER, AMERICAN INSURANCE COMPANY v.	261
DETROIT v. MICHIGAN PAVING CO. <i>Charter of Detroit: Public works: Lowest bidder: Contracts: Quantum meruit.—Public improvements: Implied contracts: Broken contract.—Municipal corporations: Appropriation of private property.—Street paving: Work done under forfeited contract.—Paving: Materials: Conversion: Assumpsit: Waiving the tort.—Special assessment: Charter: Public letting: Property appropriated: Presentation of claim to council for audit.</i>	335
DEWITT, JOHNSON v.	95
FAIRCHILD, BROOKS v.	231
FARRAR, HEYN v.	258
FENNEL v. COMMON COUNCIL OF BAY CITY. <i>Fines: By-laws: Bay City: County treasury.—Penal laws defined:</i>	

	PAGE.
<i>Constitutional law.—City by-laws: Penalties: Disposition of proceeds.—Police court of Detroit: State offenses.</i>	186
FINN v. CORBITT. <i>Assignment: Right of action in tort.—Trespass: Assignee: Presumptions.—Judgment: Set-off: Notice.</i>	318
FIRST NATIONAL BANK OF STURGIS v. REED. <i>Evidence: Opinion of party as to his liability: Relevancy.—Banks: President: Breach of trust: Loans to insolvent person: Agency: Adverse interests.—Fraud: Credit: Books of account: Collusion: Notice.—Agency: Accessory.—Silence: Ratification: Question of fact.</i>	263
FOSTER, AMERICAN CIGAR CO. v.	368
FOX, GROVER v.	453
FOX, GROVER v.	461
FRENCH, AUSTIN v.	199
GAGE v. GAGE. <i>Deed: Delivery: Husband and wife.—Case made by the bill.—Illegal purpose: Fraud: Delaying creditors.</i>	229
GANO v. HEATH. <i>Finding of facts: Supported by evidence: Weight of evidence.—Promissory notes: Joint makers: Extension: Additional name: Surety.</i>	441
GIBSON v. SCHOOL DISTRICT NO. 5 OF VEVAY. <i>School districts: Charts: Appendages of school-house: Director.—Discretion of officers: Necessity.—Unauthorized purchase: Ratification.</i>	404
GILLAM v. BOYNTON. <i>Findings of fact: Evidence: Conclusion of law.—Special findings: Conclusions of fact.—Married women: Property purchased.—Purchase: Promissory notes.</i>	236
GOLDSMITH, BOTTOMLEY v.	27
GOODYEAR DENTAL VULCANITE CO., SULLINGS v.	318
GRAND RAPIDS v. HASTINGS. <i>Plats: Acknowledgment: Seal: Record: Evidence: Highway.</i>	122
GROESBECK, BROWNELL v.	501
GROVER v. FOX. <i>Bill to quiet title: Possession: Title: Res adjudicata: Contract for conveyance: Attachments.—Right of possession of lands for term of years: Chattel interest: Execution levy.—Contingent right to conveyance: Equitable interest: Levy.—Subsequent proceedings.—Condition: Time: Attachment levies: Sales.—Contract to reconvey: Offer to perform.</i>	453
GROVER v. FOX. <i>Mortgages: Power of sale: Statutory requisites: Mistake: Good faith.—Statutory foreclosure: Illegality: Giving time to redeem.—Contiguous parcels occupied as one farm: Sales in parcels.—Deeds: Sale: Parcels.—Foreclosure deed: Acknowledgment: Statute construed.—Ante-dated: False certificate of acknowledgment.—Two separate</i>	

	PAGE.
<i>deeds: Inconsistent deeds: Ambiguity: Files.—Sufficient sold to satisfy mortgage: Further sale void.—Irregular statutory foreclosure: Bill to redeem: Decree: Void sale: Sale under decree.</i>	461
HACKETT v. JUDGE OF WAYNE CIRCUIT. <i>Affidavit for capias: Statement of facts and circumstances.</i>	334
HAINES, SINGER MANUFACTURING CO. v.	385
HALBERT v. SCHOOL DISTRICTS NOS. 2, 3, AND 5, OF WATERTOWN. <i>School districts: New districts: Parceling out territory: Joint liability for debts.</i>	421
HANOLD v. BACON. <i>Unrecorded deed: Second deed: Fraud: Trustees.—Compromise: Conflicting claims.—Fraudulent deed: Mortgage obtained by fraud: Reconveyance: Rescission.—Second conveyance: Actionable wrong.—Equity jurisprudence: Fraudulent claims: Equities.</i>	1
HARLOW v. LAKE SUPERIOR IRON CO. <i>Landlord and tenant: Mines.—Lease: Construction: Intention: Entire instrument.—Mining privilege: Particular use: Possession.—Use of premises for agricultural purposes: Right of possession.—Mining right: Incorporal interest: Ejectment.—Agreement to sell to lessee, etc.—Undivided half: Assignment: Indivisible interest.</i>	105
HARTFORD FIRE INS. CO. v. REYNOLDS. <i>Charge to the jury: Error cured.—Competency of witness.—Disclosures to an attorney.—Agency: Brokerage.—Notice and return of premium to an insurance agent.—Revivor of canceled policy by an insurance agent.—Insurance company not bound by agent's acts done outside of the agency.—Conversation: Statements of plaintiff.</i>	502
HART v. CARPENTER. <i>Equity pleading and practice: Sworn answer: Affirmative defense.—Foreclosures: Payment to adverse claimant: Evidence: Matters equally within knowledge of deceased.—Payment to third party: Consent of mortgagee.—Amount: Proofs.</i>	402
HASTINGS, GRAND RAPIDS v.	122
HAYES v. HOMER. <i>Notice: Evidence: Weight: Tendency: Question for jury.—Record: Absence of evidence: Bill of exceptions.—Weight of evidence: Credibility.</i>	374
HAYNES v. KNOWLES. <i>Jurisdiction: Return: Amendment: Discontinuance.—Notice.—Officer: Misconduct: Ex parte amendment.—Attachment: Levy: Partnership property: Individual interest: Specific chattels.—Firm property: Joint action: Damages: Destruction of business.</i>	407
HEATH, GANO v.	441
HELMER v. KROLICK. <i>Mortgages: Assignee: Negotiable paper: Bona fide holder.—Promissory notes: Payable on or before a specified time: Due: Bona fide purchaser.—Bad</i>	

	PAGE.
<i>faith of payee.—Agent for collection.</i>	371
HEYERMAN v. KANTER. <i>Declaration: Common counts in assumption: Evidence: Use and occupation.</i>	316
HEYMAN v. COVELL. <i>Plea in abatement: Replevin: U. S. marshal: Execution: Demurrer.—Property of stranger: U. S. courts: Jurisdiction: Judgment.—Taking property of third persons: Trespass: Forum.—Plea to the jurisdiction.</i>	157
HEYN v. FARRAR. <i>Dissolution of attachment: Circuit court commissioner: Partner of plaintiff's attorney: Disqualification.—Circuit judge: Commissioner of adjoining county.—Proceedings to dissolve attachment: Entitling: Special proceedings.</i>	258
HOMER, HAYES v.	374
HORNER v. BIGGAM. <i>Township drain commissioner: Appeals: Statute construed.—Certiorari: Jurisdiction.—Jury: Time.—Unauthorized appeal: Affirmance: Errors that do not prejudice.</i>	243
HOUGHTON COUNTY v. AUDITOR GENERAL. <i>Mandamus: Strict legal duty: Discretionary matters.—Delinquent tax returns: Auditor general: Returns forwarded too late.—Discretion: Accounts between state and county: Belated returns.</i>	271
HOWE, WEBBER v.	150
HURD v. NEWTON. <i>Rulings on evidence: Printed record: Objections abandoned.—Question of fact: Submission to the jury: Lack of evidence: Error not presumed.—Charge to the jury: Special requests.</i>	35
HUSBAND, PEOPLE v.	306
INGHAM COUNTY TREASURER, MEAD v.	416
INNES v. STEWART. <i>Foreclosures: Deficiency: Proceedings at law: Leave of court.—Personal decree: Service: Appearance: Publication.—Foreclosure sales: Interference to prevent fair sale: Estoppel.</i>	285
JARVIS, LAWRENCE v.	281
JEUDEVINE v. ROSE. <i>Sureties: Future mercantile engagements: Time: Withdrawal: Discharge.</i>	54
JOHNSON v. DEWITT. <i>Attachment: Application for dissolution: Right of possession.—Executions.</i>	95
JOHNSON v. KIBBEK. <i>Plea puis darrein continuance: New issue.—Special pleas: Statute construed.</i>	269
JONES v. BEESON. <i>Evidence: Matters equally within knowledge of deceased.</i>	214
JONES v. SACKETT. <i>Vendor's lien: Primary school lands: New certificates: Fraud.</i>	192
JUDGE OF MONROE CIRCUIT, MCCARTHY v.	274
JUDGE OF WAYNE CIRCUIT, HACKETT v.	334
JUDGE OF WAYNE CIRCUIT, KEAL v.	331
JUDGE OF WAYNE CIRCUIT, RANDALL v.	500

	PAGE.
KALAMAZOO NOVELTY MANUFACTURING CO. v. MCALISTER. Corporations: Officers: Treasurer: General authority.— Superintendent: Salary: Admissions.—Jury: Taking docu- ments to jury-room.—Parts not in evidence.	327
KANE v. CLOUGH. Assignment: Mere possibility: Future wages: Existing employment.—Demands not in existence: Agreement: Remedy in equity.—Garnishee proceedings: Naked legal title: Equitable title in another.—Employment: Piece-work: Wages earned in continuous employment.	436
KANTER, HEYERMAN v.	316
KEAL v. JUDGE OF WAYNE CIRCUIT. Justice's courts: Joint parties: Appeals.	331
KEESLER, BILLS v.	69
KENNEDY, UPTON v.	215
KENT COUNTY TREASURER, COVELL v.	332
KEYSTONE IRON CO., COLWELL v.	51
KIBBEE, JOHNSON v.	269
KINNEY, YOUNG v.	27
KIRBY, LYNCH v.	238
KNOWLES, HAYNES v.	407
KRANICH, AURORA FIRE AND MARINE INS. CO. v.	289
KROSLICK, HELMER v.	371
LAKE SUPERIOR IRON CO., HARLOW v.	105
LAWRENCE v. JARVIS. Foreclosure sale: Order setting aside sale: Appeal: Interested party.—Setting aside foreclosure sale: Third party interested: Notice.	281
LIEBERMAN v. BARMAN. Guaranty: Condition: Performance: Construction.	380
LOOMIS v. BRUSH. Husband and wife: Deeds: Married wo- man's act.—Deed from husband to wife.—Equity jurispru- dence.—Registry: Void deed: Constructive notice: Equi- ties.—Bona fide purchasers.—State claims.	40
LOVELL, OSBURN v.	246
LYNCH v. KIRBY. Probate courts: Guardian and ward: Ju- risdiction: License to sell: Petition.—Petition for license to sell.—Guardian's sale: Death of guardian: New guardi- an: Conveyance.—Oath before sale.—Subject to mortgage: Bond: Discharge.—Appointment of guardian: Record: Con- sent of ward: Parol evidence.—Charge to the jury: Evi- dence.—Ejectment: Joint plaintiffs: Declaration: Joint ti- tle: Undivided interest.	238
LYON v. WALDO. Mortgages: Illegal consideration: Settle- ment of prosecution for adultery: Ratification: Estoppel.— Contracts: Confirmation: Part performance.—Illegality: Defense: Public policy.—Adultery: Initiation of prosecu- tion: Injured spouse: Settlement: Statute construed.—Prose- cution: Injured husband or wife.—Husband and wife: Sep-	

	PAGE.
arate maintenance: Arrest for adultery.—Duress: Securities: Fraud: Laches.—Voidable securities.—Criminal prosecution.	345
MANISTEE, PETERSON v.	8
MARBLE v. MARBLE. Divorce: Adultery: Bill of complaint: Charge of living "in open and notorious adultery."—Proofs: Circumstantial evidence.—Reputation: Evidence.	386
MARVIN, WELCH v.	59
MATTER OF GEORGE W. WOOL. Attorney: Fraud: Abuse of confidence: Equity suit: Proceedings to disbar: Practice.—Proceedings to disbar an attorney.—Showing in defense.—Questions of fact: Chancery causes: Opinion of circuit judge: Appellate court.—Determination of questions of fact: Belief: Reasons.—Immaterial matters.—Character of person defrauded.	299
MAYNARD v. WOODARD. Wills: Bequest: School district: Library.—Beneficiaries: Managers: Trust: School district board.—Libraries: School apparatus: Public school purposes.—Public school library: Charities: Definiteness: Discretion: Intent.—Public corporations: Acceptance.	423
MCALISTER, KALAMAZOO NOVELTY MANUFACTURING CO. v.	327
MCCARTHY v. JUDGE OF MONROE CIRCUIT. Mandamus: Review of motion: Record.—Facts on which action was taken: Legal rights.—Facts established below.	274
MCHUGH, BROWN v.	433
MCKINNEY v. MCKINNEY. Equity pleading and practice: Pre-mature decree: Notice of hearing.	37
MEAD v. TREASURER OF INGHAM COUNTY. Superintendents of the poor: Removal from office: Supervisors.—Mandamus: Title to office: Warrants: Officers de facto.—Officers: Void appointment: Recognition.—Answer: Acquiescence.	416
MERRILL, MONTGOMERY v.	97
METZ v. TODD. Mortgages: Collateral to notes of third person: Payment.—Sureties: Extension: Release.	473
MICHIGAN PAVING CO., DETROIT v.	335
MONROE COUNTY SUPERVISORS, AUDITOR GENERAL v.	70
MONTGOMERY v. MERRILL. Amendments: Record: Extrinsic showing: Notice to adverse party.—Party adversely interested: Notice.—Intervening rights of third parties.—Defective proceedings: Application to amend: Long delay: Excuse.—Judgment: Record: Jurisdictional defects: Parol evidence.	97
MOOTE, SCRIVEN v.	64
MORGAN v. CHICAGO & N. E. R. R. CO. Condemning lands for railroad purposes: Probate court: Jurisdiction: Notice.	428
NEWTON, HURD v.	35

	PAGE
NIMS, VAUGHN v.	297
NORTON, COMSTOCK v.	277
O'BRIEN v. TALLMAN. <i>Justice's courts: Judgment: Setting aside judgment: New judgment.—Mandamus: Remedy: Appeal: Certiorari.</i>	13
ODELL, ROGERS v.	411
OSBORN v. OSBORN. <i>Partnership: New firm: Assuming debt of original firm: Promise to third person.—Dealing with creditors: Notice: Husband and wife.—New member: Assuming debts: Creditors: Accepting new firm as debtor.</i>	48
OSBURN v. LOVELL. <i>Trespass to lands: Cutting timber: Treble damages: Evidence: Plea: General issue.—Statutory exceptions: Pleadings.—Mitigation of damages.—Trespass: Declaration: Application of verdict.</i>	246
PACK v. SUPERVISORS OF PRESQUE ISLE COUNTY. <i>Mandamus: Doubtful rights.—Warrants for county buildings: Vote of people.—Removal of county seat: Designation of place.—Supervisor's warrants: Existence of county.</i>	377
PALMER v. PALMER. <i>Promissory notes: Payable thirty days after demand: Statute of limitations.—Demand: Delay.—Construction: When cause of action accrues.</i>	487
PEET, WRIGHT v.	213
PEOPLE, BROWN v.	203
PEOPLE, CURKENDALL v.	309
PEOPLE v. BRADLEY. <i>Legislative authority: Boundaries of representative districts: Supervisors.—Change of boundaries: Constitutional restriction: New enumeration.—Constitutional law: Titles of statutes: Defining boundaries: Cities.</i>	447
PEOPLE v. HUSBAND. <i>Criminal law: Fraudulent conversion: Trunks: Checks: Delivery: Larceny.—Baggage checks: Hotel keeper: Lien: Fraudulent conversion.—Good faith: Baggage.</i>	306
PETERSON v. MANISTEE. <i>City orders: Assumpsit: Remedy: Mandamus.</i>	8
PHILLIPS, PORTAGE LAKE MINERS' & MECHANICS' BENEVOLENT SOCIETY v.	22
PORTAGE LAKE MINERS' & MECHANICS' BENEVOLENT SOCIETY v. PHILLIPS. <i>Declaration: Charitable society: Benefits: By-laws: Duplicity.—Demand: Assumpsit.—Condition precedent: Performance of condition.—Corporations: By-laws of a society: Judicial cognizance: Averment of liability.</i>	22
POST v. RICH. <i>Evidence: Registry laws: Records: Copies: Originals lost or destroyed.</i>	16
PRAY, BUCHOZ v.	429
PRESQUE ISLE COUNTY SUPERVISORS, PACK v.	377
PROBATE JUDGE OF ST. JOSEPH COUNTY, CAMPAU v.	500

TABLE OF CASES.

XV

	PAGE.
RANDALL, CADWELL v.	251
RANDALL v. JUDGE OF WAYNE CIRCUIT. <i>Order to hold to bail vacated: Requiring defendant to enter appearance: Discretion.</i>	500
REED, FIRST NATIONAL BANK OF STURGIS v.	263
REYNOLDS, HARTFORD FIRE INS. CO. v.	502
REYNOLDS v. CONTINENTAL INS. CO. <i>Agency: Authority: Evidence: Assumption of authority by the agent.—Insurance: Custom.—Special risks: Acting as local agent.—Practice: Exclusion of evidence: Bill of exceptions: Propositions of proof.—Implied meaning.—Construction: Acquiescence.—General proposition to prove case made by declaration.—General proposition of proof.</i>	131
RICH, POST v.	16
ROGERS v. ODELL. <i>Specific performance: Land contract: Certificate: State patent: Fraud.—Contracts: Partial agreements: Written instrument: Evidence.—Inconsistent action.—Mistake.</i>	411
RORABECK, BARBER v.	399
ROSE, JEUDVINE v.	54
SACKETT, JONES v.	192
SANBORN, AU SABLE RIVER BOOM CO. v.	358
SAUNDERS, ST. DENIS v.	369
SCHOENBERG v. VOIGT. <i>Father and son: Services of minor son: Quantum meruit: Character of the service: Embezzlement.—Evidence: Emancipation.—Charge to the jury: Requests to charge.—Obscurity.—Propositions of fact: Irrelevant subjects.</i>	310
SCHOOL DISTRICT NO. 5 OF VEYAY, GIBSON v.	404
SCHOOL DISTRICT NO. 9 OF RUTLAND, BOWEN v.	149
SCHOOL DISTRICTS NOS. 2, 3, AND 5, OF WATERTOWN, HALBERT v.	421
SCOTT, ATKINSON v.	18
SCRIVEN v. MOOTE. <i>Foreclosures: Chancery sales: Growing crops: Purchaser.—Previous parol agreements.—Bill to redeem: Bond for injunction: Title to growing crops.</i>	64
SEYBOLD, CRAPO v.	444
SHEA, VARY v.	388
SHEPARD v. SHEPARD. <i>Foreclosures: Bill of complaint: Description of premises: Mortgages: Variance.—Answer: Annexing copy deed: Pleading: Evidence: Plats.—Lots and blocks: Judicial notice.—Mistake in description.—Design to exclude certain lands.—Fraud: Conspiracy: Unrecorded deed.—Title: Notice: Blind remarks: Ambiguous hints.</i>	173
SINGER MANUFACTURING CO. v. HAINES. <i>Sales: Promissory notes: Agreement to receive pay in labor.</i>	385

	PAGE.
SLATER v. BREESE. <i>Mortgages: Description of premises: Identification: Evidence.—Incorrect description.—Foreclosure bill: Correct description.—Amendments at the hearing: Subsequent mortgages.—Equity pleading and practice: Application to take further proof.—Second and third mortgages: Intermediate grant: Subject to first mortgage.—Order of sale: Second and third mortgages.—Decree.—Third mortgage: Second mortgage: Amount.—Report of amount due: Excess: Appeal: Exceptions.</i>	77
STALEY v. COLUMBUS. <i>Townships: Suit for unpaid taxes: Judgment: Tax-roll.—Treasurer: Taxes: Payment in worthless orders: Receipt: Settlement.</i>	38
ST. DENIS v. SAUNDERS. <i>Referees: Finding of facts: Partnership.—Finding of referee: Inferences.—Cutting cedar posts on shares.</i>	369
STEELE, YELVERTON v.	62
STETSON v. SUPERVISORS OF CALHOUN CO. <i>County clerk: Compensation: Salary: Clerk of board of supervisors.—Services as building committee: Implied promise: Contract.—Annual salary: Specific fees.</i>	10
STEWART, INNES v.	285
STILSON, CLARK v.	492
ST. JOSEPH COUNTY PROBATE JUDGE, CAMPAU v.	500
STONE, WAGAR v.	364
SULLINGS v. GOODYEAR DENTAL VULCANITE CO. <i>Evidence: Pleadings: Defense: Decree in another suit: Res adjudicata.—Pendency of another suit: Plea in abatement.—Contracts: Permission to use patented improvement: Injunction.—Irregular service: Subpœna: Violation of contract.—Breach.</i>	313
SUPERVISORS OF CALHOUN COUNTY, STETSON v.	10
SUPERVISORS OF MONROE COUNTY, AUDITOR GENERAL v.	70
SUPERVISORS OF PRESQUE ISLE COUNTY, PACK v.	377
TALLMAN, O'BRIEN v.	13
TAYLOR, YOUNG v.	25
TODD, METZ v.	473
TREASURER OF KENT CO., COVELL v.	332
TREASURER OF INGHAM CO., MEAD v.	416
TRIPP v. CURTENIUS. <i>Certificates of deposit: Promissory notes: Payable on demand.—Certified checks: Lapse of time: Past due.—Demand paper: Bank bills.—Statute of limitations: Bona fide purchaser.</i>	494
TUCKER, COLDWATER v.	474
UPTON v. KENNEDY. <i>Constitutional law: Legislative authority.—Special finding: Conclusion of law: Finding of facts.—Tax-titles: Construction: Excessive levy.—Taxation: Township taxes: Lawfully voted: Board of supervisors:</i>	

	PAGE.
<i>Certificate.—Township expenses.—Return of township collector: Signature: Verification.—Tax deeds: Statute construed: Sales: Return.—Constitutional questions.</i>	215
VAIL, CARPENTER v.	226
VANDEBURGH, WESTBROOK v.	30
VAN ETTEN, BAY CITY BRIDGE CO. v.	210
VARY v. SHEA. <i>Mistake: Contracts: Evidence: Deliberation.—Construction.—Agreement to discharge mortgage: "Expense."—Equity jurisprudence: Affirmative relief: Cross-bill.</i>	388
VAUGHN v. NIMS. <i>Foreclosures: Computation of amount due: Reference.—Decree: Amount: Installments accruing after bill filed.—Mortgagees: Taxes.—Sales: Entirety: Parcels.</i>	297
VOIGT, SCHOENBERG v.	310
WAGAR v. STONE. <i>Mortgages: Title: Security: Right of possession.—Foreclosures: Receivers: Rents and profits.</i>	364
WALDO, LYON v.	345
WEBBER v. HOWE. <i>Prohibitory liquor law: Order for liquors: Shipment from Ohio: Michigan contract.—Oral order: Void under statute of frauds: Ratification: Acceptance.—Repealing act: Previous unlawful sales.—Set-off: Moneys paid for liquors: Unlawful sales.—Payment: Evidence: Orders.</i>	150
WELCH v. MARVIN. <i>Promise to pay for goods furnished to another: Original undertaking: Statute of frauds.</i>	59
WESTBROOK v. VANDERBURGH. <i>Dower: Lands conveyed by husband: Provisions for widow in will: Election.</i>	30
WIDOE, ARMITAGE v.	124
WILCOX v. ALLEN. <i>Mortgages: Notes: Interest: Payment: Saw-bill.—Contracts: Several instruments: Single transaction: Construction.—Application of payments.—Manufacturing lumber: Scaling: Excess.—Interest clause: Election to declare whole due: Dispute as to interest due.—Insurance collected.—Payment by sawing: Mortgagees: Assignee.—Foreclosures: Assignment: Cross-bill.—Several notes: Priority.—Assignment as collateral: Personal liability of assignors.</i>	160
WOODARD, MAYNARD v.	423
WOOL, GEORGE W., MATTER OF.	299
WRIGHT v. PEET. <i>Mortgages: Defense: Fraud: Laches.</i>	213
YELVERTON v. STEELE. <i>Taxation: Supervisor's certificate: Review: Date: Time: Presumptions.—Equalization of valuation: State tax.—Records: Informal action not recorded.—Amount: Apportionment: Basis of estimate.</i>	62
YOUNG v. KINNEY.	27
YOUNG v. TAYLOR. <i>Declaration: Special count: Assumpsit: Common counts: Misjoinder.—Judgment not supported by evidence: Record: Weight of evidence: Error not presumed.</i>	25

POST V. RICH.

The action was tried without a jury and the judge found the facts and decided that defendant was entitled to judgment upon them. The plaintiffs ask that the proceedings be reviewed on a case. No point is made on the findings. Unless some error was committed in rulings in regard to evidence, the judgment cannot be disturbed. In respect to most of the facts there was no dispute. But the result hinged upon a conveyance the defendant claimed to have been made by Andrew Rector and Edwin R. Cobb to one Charles A. Roosevelt, in April, 1859, and this conveyance was a deed of assignment with schedules. The main instrument contained apt words of conveyance, but no specific descriptions. The identification of parcels was left to schedules. The defendant claimed that soon after they were made, the deed and schedules were copied by the register of deeds into one of the books of deeds in his office on the request of Roosevelt to record them, and that Roosevelt was dead and the original papers lost, and he gave evidence which was sufficient, *prima facie*, to show the existence and delivery of the papers and their loss, and also that they were copied by the register into the book of deeds, and he was allowed to introduce these copies for the purpose of proving the contents of the lost originals. A number of objections were taken by plaintiffs' counsel, during the course of this proof, but it is unnecessary to detail them. They were all grounded upon the assumption that the copies in the register's book were either records or adduced as records. This was a misapprehension of the scheme of proof. When the entries in the book of deeds were first offered by defendant, plaintiffs' counsel objected to them as not lawful records, and the court sustained the objection. Defendant's counsel then shifted ground and suggested that he would seek to show the conveyance by secondary evidence, and following up the suggestion, he proceeded to give evidence of the existence and loss of the originals, and of their contents, and adduced the entries by the register for this latter purpose.

POST V. RICH.

This method of proof was not illegal. It was entirely regular, and the objections, that the record was the best evidence, that it must prove itself, that parol evidence was not admissible to prove the contents of a deed, or change or explain a record, were entirely inapplicable. Moreover, as already stated, the plaintiffs' counsel had just taken the position that the entries were not records, and had secured a ruling to that effect, which excluded them as records, and when, in consequence of such objection and ruling, the defendant proceeded to use them as mere copies, as a step in making secondary proof, it was scarcely consistent to assume they were records, as a ground for urging new objections. But whether they were or were not regular records, we do not see upon what principle the plaintiffs could object to their use by defendant as inferior proof, if he chose so to use them. Whether the evidence actually given for that purpose was or was not of sufficient weight to show what the originals contained, is not a question for discussion here. The exceptions only go to the admissibility of the evidence, and it was clearly admissible.

The case presents nothing further. No ground is seen for disturbing the judgment, and it must be affirmed, with costs.

The other Justices concurred.

John Atkinson v. Sophia Scott.

Land contracts: Conveyance by vendor to third person: Rescission: Consideration paid. Where a party under contract to sell lands to one, conveys the same without his consent to another, the original vendee is clearly entitled to regard his contract as rescinded by his vendor, and is entitled to have restored what he had paid upon the contract, subject to such deductions as equity should require.

ATKINSON v. SCOTT.

Money had and received: Equitable action. The action for money had and received is an equitable action and must be subject to equitable principles.

Question of fact: Conflict of evidence: Taking question from jury. In an action by the vendee in a land contract against his vendor, to recover back the purchase money paid, the vendor having conveyed the premises to a third person, where there is a conflict of evidence as to whether this conveyance was by the consent of such vendee, it is error for the court to take the question away from the jury and to direct them to find for the defendant.

Heard January 17. Decided January 23.

Error to Superior Court of Detroit.

James T. Keena, Atkinson & Atkinson and H. M. Cheever,
for plaintiff in error.

Ward & Palmer, for defendant in error.

CAMPBELL, J:

This is an action to recover money paid by Atkinson upon a contract afterwards rescinded, as he alleges, by Mrs. Scott.

In February, 1873, Atkinson agreed in writing to purchase from Mrs. Scott a house and lot for eight thousand four hundred and seventy-five dollars, of which four hundred and seventy-five dollars was paid down, and the remainder provided for as follows: five hundred dollars and interest, July 31st, 1873, one thousand dollars and interest, May 1st, 1874, and five hundred dollars and interest, July 31st, 1874, all of these being secured by collaterals. For the remainder, he was to assume two mortgages on the premises, held by the Springfield Savings Bank, of six thousand dollars, and procure the release therefrom of certain adjoining premises, by November 22d, 1873, as well as pay taxes and insurance.

On the 13th of April, 1874, Atkinson made a written agreement with Joseph P. Whittemore to sell him the property for eight thousand five hundred dollars, of which five hundred dollars was to be paid down, two thousand dollars with interest on delivery of deed or assignment of contract,

ATKINSON v. SCOTT.

payable by a note of George H. Prentis, due June 18th, 1875, secured by mortgage, and endorsed by Whittemore, and the assumption, with interest from date, of the two mortgages of six thousand dollars.

Atkinson paid the note due July 1st, 1873, of five hundred dollars and interest, and paid five hundred and eighty-six dollars interest on the mortgages. Whittemore paid Atkinson the first payment due him of five hundred dollars, and on the 6th day of July, 1874, paid three hundred dollars interest on the mortgages.

On the 3d of August, 1874, Mrs. Scott, at Whittemore's request, conveyed the premises to his wife, Mrs. Kate A. Whittemore, and she gave a mortgage back to Mrs. Scott, for one thousand six hundred and forty-eight dollars and seventy-five cents, being the two last installments which were due from Atkinson to Mrs. Scott, and gave as collateral thereto a note of George H. Prentis, for two thousand dollars, and paid the bank one hundred and twenty-eight dollars and sixty cents, for taxes and insurance before advanced by them, and made a further payment on the mortgage of one thousand one hundred and four dollars, and obtained a release of the lot which was to have been released under the Atkinson purchase from Mrs. Scott.

Atkinson, after making his purchase, received rent from a tenant while not occupying the premises himself, and when he sold to Whittemore, he put the latter in possession.

It was claimed, but contradicted, that Atkinson had, in consequence of urgency from Mrs. Scott for settlement, consented to arrangements whereby the property was to be conveyed to Whittemore.

If the conveyance was made by Mrs. Scott to Mrs. Whittemore without Atkinson's consent, he was clearly entitled to regard the contract as rescinded by Mrs. Scott, and entitled to be restored what he had paid upon the contract, subject to such deductions as equity should require. She could not terminate the contract and still retain the consideration. But on the other hand, Atkinson would be bound

ATKINSON v. SCOTT.

to allow, by way of reduction, such legally ascertained benefits as he had received and retained. The action for money had and received is, as frequently decided by this court, an equitable action, and must be subject to equitable principles.—*Beardslee v. Horton*, 3 Mich., 560; *Spencer v. Towles*, 18 Mich., 9; *Moore v. Mandlebaum*, 8 Mich., 433; *Catlin v. Birchard*, 13 Mich., 110; *Blackwood v. Brown*, 34 Mich., 4.

He was not bound to convey the land or assign the contract to Whittemore, without receiving securities to the amount of two thousand dollars, and there was no contract whatever between him and Mrs. Whittemore. There was no condition of things which would make it proper for Mrs. Scott to convey the land to either without Atkinson's consent.

Although there was contradictory testimony on this point, the court directed the jury to find for the defendant below, Mrs. Scott. This left all the other questions undecided, and we are not informed what view might have been taken of them, or how the account would have stood, had the action been allowed to go to the jury. It would therefore be out of place for us to decide what allowances should be made on either side. The case should have gone to the jury, under proper directions, and they should have found such balance as Atkinson was entitled to under all the facts, unless they found he had consented to the conveyance to Mrs. Whittemore.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

PORTAGE LAKE MINERS' & MECHANICS' BENEVOLENT
SOCIETY v. PHILLIPS.

The Portage Lake Miners' & Mechanics' Benevolent
Society v. John Phillips.

Declaration: Charitable society: Benefits: By-laws: Duplicity. In an action against a society for benefits claimed to be due from it under its articles of association and by-laws, a count which combines a cause of action for a monthly allowance based upon one set of regulations with a distinct cause of action upon another set of regulations for a round sum claimed to accrue to a retiring member, is held bad on demurrer for duplicity.

Declaration: Charitable society: By-laws: Demand: Assumpsit. A count for a recovery from a charitable society, under the by-laws, of an allowance on account of disability caused by injury, which is not supported by any averment of a demand, or of any assumpsit by the company, and which fails to state any facts on which the law might infer a liability in assumpsit, is demurrable; and an allegation that the company became indebted to and promised to pay plaintiff a specified sum as a consequence of his withdrawal, as provided by the by-laws, is not a statement of a cause of action.

Declaration: Condition precedent: Performance of condition. In a count seeking to recover withdrawal money, which proceeds upon the theory that it is necessary as a condition precedent that a certificate of plaintiff's medical attendant be presented to the board of trustees and that they should have reasonable opportunity to act upon the case, it is essential that facts be set forth showing that opportunity was actually given the board to act upon the case, or that they refused or neglected to act.

Declaration: By-laws of a society. A count which merely refers to certain supposed by-laws as entitling plaintiff to claim a specified sum in a given contingency, and in case of certain steps taken by him, without setting out the by-laws relied upon, or averring the necessary facts to justify the conclusion, is bad on demurrer.

Corporations: By-laws: Judicial cognisance: Averment of liability. The court cannot take judicial notice of the by-laws of a corporation, or assume that the company agreed, through a by-law, or otherwise, that upon plaintiff's disablement and withdrawal he should receive a specified sum of money, but the existence of such by-law or agreement must be averred, together with such facts as are essential to show that the defendant became liable under and by virtue thereof.

Heard January 17. Decided January 23.

Error to Houghton Circuit.

T. M. Brady and C. I. Walker, for plaintiff in error.

Chandler & Grant, for defendant in error.

PORTAGE LAKE MINERS' & MECHANICS' BENEVOLENT
SOCIETY v. PHILLIPS.

GRAVES, J.:

Defendant in error sued in assumpsit for certain benefits claimed as his due from the company under their articles of association and by-laws.

The declaration contained three counts, to which the company demurred generally, and also on special grounds. The court overruled the demurrer, and gave final judgment against the company, the damages being assessed at two hundred and forty dollars and sixty cents. The company brought error.

The first count is open to objection for duplicity; it attempts to base a cause of action on one set of regulations for a monthly allowance, and a distinct cause of action on another set of regulations for a round sum, claimed to accrue to a retiring member of the company.

The actionable grounds of these claims are distinguishable and separate, and ought not to be united in the same count. But passing this objection, which is one of form only, the count appears to be subject to others, which are substantial.

The claim for allowance under section one of article six of the by-laws, on account of disability caused by injury, is not supported by any averment of a demand, or of any assumpsit by the company. No facts are stated on which the law might infer a liability in assumpsit. The allegation that the company became indebted to and promised to pay Phillips twenty-four dollars and twenty-six cents as a consequence of his withdrawal in January, 1875, as provided by the by-laws, is not a statement of a cause of action. There should be facts to explain in what way the withdrawal led to and involved the asserted consequence. How the by-laws might help to the liability cannot appear unless they are shown, with such other matters as would bring the state of facts into legal order. In regard to the claim for two hundred dollars on account of the withdrawal, the count proceeds upon the theory that by the contract between the

PORTAGE LAKE MINERS' & MECHANICS' BENEVOLENT
SOCIETY v. PHILLIPS.

parties, as embodied in the article and by-laws, it was necessary as a condition precedent to any right to withdrawal money, that a certificate of Phillips' medical attendant should be given to the board of trustees, and that the board should have at least reasonable opportunity to act upon the case. Whether the theory of the count, or the truth of the case, would require it to appear likewise, that in fact there was approving action by the board, is not necessary to be considered now.

It is sufficient to observe, that if the count be taken as intending only that reasonable opportunity for the board to take action was a necessary preliminary, and certainly its scheme goes thus far, it is still defective in substance. No facts are set forth to show that opportunity was actually given to the board to act upon the case, or that they neglected or refused to act.

The second count is clearly bad. It refers to certain supposed by-laws as entitling Phillips to claim two hundred dollars in a given contingency, and in case of certain steps taken by him. No cause of action is apparent here; facts are wanting to justify the conclusion. The by-laws relied on are not set out in any way, and some other matters which would be essential in connection with them are omitted. The court cannot say upon this statement that Phillips was in law entitled to any thing.

The only difference between this and the third count is, that the latter alleges that on receiving the certificate of Phillips' medical attendant, the board neglected and refused to take action. This count is also fatally defective. We cannot know what right the membership of Phillips, and his withdrawal as alleged, and the refusal of the board to act, gave him to claim two hundred dollars, or any other sum. We cannot take judicial notice of the supposed by-laws, nor can we assume that the company agreed, through a by-law, or otherwise, that upon Phillips' disablement and withdrawal he should receive two hundred dollars, or any

PORTAGE LAKE MINERS' & MECHANICS' BENEVOLENT
SOCIETY v. PHILLIPS.

other amount.—*Company of Feltmakers v. Davis, 1 B. & P., 98; Plant v. Wormager, 5 Blackf., 236.*

There are other defects in this declaration, but it is not necessary to refer to them.

The judgment must be reversed, and the cause remanded, that judgment may be entered for plaintiffs in error on the demurrer, with leave to defendant in error to amend under the rule of court. Plaintiffs in error will recover their costs of this court.

The other Justices concurred.

Marcus Young v. John R. Taylor.

Declaration: Special count: Assumpsit: Common counts: Misjoinder. A count the gist of which is that the parties agreed to make a joint purchase of certain land, each to pay one-half the price, and that defendant made the purchase for fifteen hundred dollars but represented to plaintiff that the price paid was two thousand dollars and thereby induced him to pay one thousand dollars instead of seven hundred and fifty dollars as his share, and which seeks to recover back the amount thus procured from the plaintiff in excess of his share of the actual purchase price, with interest thereon, embodies the substance of a good count in assumpsit, and may properly be joined with the common counts.

Judgment not supported by evidence: Record: Weight of evidence: Error will not be presumed. An objection that the judgment is not supported by the evidence cannot prevail where the record does not show that all the evidence is reported and where the evidence reported has some tendency to support the finding. The weight of the evidence will not be considered, nor will error be presumed.

Heard January 18. Decided January 23.

Error to St. Clair Circuit.

Alkinson & Stevenson, for plaintiff in error.

Whipple & Potter, for defendant in error.

36 MICH.—4.

YOUNG v. TAYLOR.

GRAVES, J:

Taylor sued Young on the common counts, and joined a special count therewith.

Young demurred, and assigned for cause, that the special count was in tort, and that there was consequently a misjoinder of causes of action. The court overruled the demurrer, and Young pleaded over to the merits.

The cause was then tried without a jury, and the judge made a general finding in favor of Taylor for two hundred and ninety-four dollars, and judgment was entered upon it. No special findings were made. A point was made upon the alleged misjoinder of causes of action at the trial, and it is now insisted on. The special count which gives rise to the objection is certainly very inartistic and not to be commended. It does not, however, set up a cause of action in tort. On the contrary, we think it embodies the substance of a good count in assumpsit. The gist of it is, that the parties agreed to make a joint purchase of certain land, and that each should pay one-half of the price; that Young made the purchase for one thousand five hundred dollars, but informed Taylor that the price was two thousand dollars, and thereby induced him to pay one thousand dollars instead of seven hundred and fifty dollars as his share. The right to the amount thus caused to be paid by Taylor over his share, with the interest, is then demanded, and apparently upon the principle that the tort imputed to Young might be waived by Taylor, and a right of action asserted against Young as upon a promise. The theory is not wrong. We cannot say therefore that there was a misjoinder of causes of action.

It is alleged for error that the judgment is not supported by the evidence. The record does not show that all the evidence is reported. The case contains the general finding made by the judge, and a bill of exceptions, and we cannot say that the evidence returned afforded no basis for the finding. We cannot go behind that and weigh the evidence.

YOUNG v. TAYLOR.

The claim that there was no evidence that Taylor suffered damage, is without force for the reasons just stated. This disposes of the assigned errors.

The judgment must be affirmed, with costs.

The other Justices concurred.

Marcus Young v. Chester Kinney.

Error to St. Clair Circuit.

Atkinson & Stevenson, for plaintiff in error.

Whipple & Potter, for defendant in error.

GRAVES, J.:

This case is disposed of by *Young v. Taylor*, just decided. The judgment must be affirmed, with costs.

The other Justices concurred.

Thomas H. Bottomley v. James H. Goldsmith.

Promissory notes: Purchaser: Notice that payee deals in liquors: Inquiry: Consideration. A purchaser of negotiable paper is not put upon inquiry by mere knowledge that the payee is engaged in selling intoxicating liquors, to ascertain whether the consideration of the paper was not the unlawful sale of such liquors.

Promissory notes: Unlawful sale of liquors: Bona fide purchaser: Burden of proof. Proof that the consideration of a promissory note upon which suit is brought was the unlawful sale of intoxicating liquors, throws upon the plaintiff the burden of showing that he bought the note in good faith and before it fell due.—*Palon v. Coll, 5 Mich., 505.*

BOTTOMLEY V. GOLDSMITH.

Secondary evidence: Contents of letter: Loss: Prima facie case. The admission of secondary evidence of the contents of a letter against the objection that the loss of the letter was not sufficiently shown, will not be held error where the evidence of its loss was sufficient to make out a *prima facie* case, and where the party objecting made no cross-examination as to the thoroughness of the search which had been made.

Promissory notes: Intoxicating liquors: Special questions to jury. In an action upon a promissory note, where the plaintiff claims to be a *bona fide* holder and the defense set up is that the consideration of the note was the unlawful sale of intoxicating liquors, the failure of the jury to answer the special inquiry, whether the plaintiff, knowing the business of the payees, did not purposely avoid making any inquiries as to the consideration of the note, is of no consequence, as the question was not a material or proper one to put to the jury.

Special questions to jury: Requiring jury to withdraw. It is not a valid charge of error that special questions to the jury were put and answered in the court room. It is never necessary to require the jury to withdraw unless they desire it.

Heard January 18. Decided January 23.

Error to St. Clair Circuit.

Mitchell & Avery and *F. Whipple*, for plaintiff in error.

Stevens & Thomas, for defendant in error.

COOLEY, CH. J:

Goldsmith sued Bottomley on a promissory note dated March 17, 1875, payable sixty days after date to the order of O. B. Cook & Co., and endorsed to him. The defendant gave evidence which showed that the consideration of the note was a sale of liquors in violation of the prohibitory liquor law. This, under the decision in *Paton v. Coit*, 5 Mich., 505, threw upon the plaintiff the burden of showing that he bought the note in good faith and before it fell due. Evidence to this effect was given by him. The plaintiff was also allowed to testify that he had received a letter from defendant, which he had searched for and could not find, in which defendant promised him to pay the note as soon as he could dispose of lumber. This evidence was objected to on the ground that the loss of the letter was not sufficiently shown.

Regarding the loss of the letter the plaintiff was not cross-examined, and we cannot say he did not make out a

BOTTOMLEY v. GOLDSMITH.

prima facie case. Defendant should have pursued the inquiry, if he doubted the thoroughness of the search which had been made.

The defendant gave evidence that O. B. Cook & Co. had a liquor store in Detroit; that Goldsmith resided in that city and knew what their business was, and did not know of their having any further business. On this evidence the judge was asked to charge the jury, that the plaintiff was put upon inquiry regarding the consideration of the note, and failing to make inquiry, he must be held as having knowledge of such facts as by inquiry he might have learned. This instruction the judge refused. A question was also put to the jury as follows: "Did not Goldsmith, knowing the nature of Cook & Co.'s business, purposely avoid making any inquiries as to the consideration of the note?" This question was not answered.

We think the judge was justified in refusing the instruction prayed. Where parties put their negotiable paper in circulation it would be singular if they might rely upon the business of the payee as constituting a *prima facie* defense to it in the hands of third persons. If the business of the payee could be held *prima facie* notice of something wrong in the paper, so might the character of the payee be, and one setting up the defense of fraud in the inception of the note might impute bad faith to the indorsee, because, knowing that the payee was not a man of good reputation, he did not go to the maker to ascertain that the paper was not disputed. Such a doctrine would render the law of negotiable paper too unsafe for any reliance whatever. We cannot imply notice on such slender grounds. This view would dispose of the question raised on the neglect of the jury to answer the question above stated. But the question itself was improper under our previous rulings.—*Fowler v. Hoffman*, 31 Mich., 215; *Harbaugh v. Cicott*, 33 Mich., 241; *Frankenberg v. National Bank*, 33 Mich., 46.

It is objected that the questions to the jury were put

BOTTOMLEY v. GOLDSMITH.

and answered in the court room, but we know of no ground for holding this invalid. It is never necessary to require the jury to withdraw unless they desire it.

The judgment must be affirmed, with costs.

The other Justices concurred.

Susan Westbrook v. Frederick H. Vanderburgh.

Dower: Lands conveyed by husband: Provisions for widow in will: Election.

A married woman is not barred of her dower in lands whereof her husband was seized of an estate of inheritance during the marriage, and which he conveyed in his lifetime by deed in which she did not join, by reason of her having accepted the benefit of provisions made for her in the will of her husband; the statute (*Comp. L. 1871, § 4286*) requiring the widow to make her election between the provisions made for her in the will of her husband and her dower interest "in the lands of her husband," has reference only to such lands as the husband is seized of at his death.

Submitted on briefs January 18. Decided January 23.

Error to St. Clair Circuit.

Atkinson & Stevenson, for plaintiff in error.

Chadwick & Voorheis, for defendant in error.

MARSTON, J:

Plaintiff in error brought an action to recover the "undivided one-third part of the undivided one-half of that part of the Westbrook farm, so called, deeded by John J. Vanderburgh to Frederick H. Vanderburgh, * * * as her reasonable dower, as widow of her husband, William T. Westbrook, deceased."

It appears from the finding of the court, that in July,

WESTBROOK V. VANDERBURGH.

1835, Andrew Westbrook, the patentee, conveyed certain lands, of which the lands claimed form a part, to William T. Westbrook, who in May, 1836, conveyed the same to Joseph P. Minnie and William Orvis, through whom defendant, who is and has been for many years in possession and occupation of the same, claims title adversely to all other persons; that in December, 1833, plaintiff was married to said William T. Westbrook; that they lived together as husband and wife until September, 1868, when he died, leaving plaintiff and several children surviving him; that prior to the death of William T. Westbrook, he made his last will, which was duly probated and allowed, by which he gave and bequeathed to his wife, the plaintiff, to be held by her during her natural life, the farm on which he then resided, with the appurtenances belonging thereto, and that the plaintiff has, under said will, continued to use, occupy, and enjoy the provisions so made for her, and has never made an election waiving the provisions of the will. The court, from the facts found, as conclusions of law, held, that under the provisions of §§ 4286 and 4297 of the *Compiled Laws*, the plaintiff's right to dower was barred, and judgment was rendered for defendant. Upon this conclusion error is alleged.

The only question raised is, does the acceptance by the widow, of the devise to her under the provisions of her husband's will, bar her of dower in the real estate he sold and conveyed in his lifetime, after their marriage, and in the conveyance of which she did not join.

The statutes of this state provide, that "the widow of every deceased person shall be entitled to dower, or the use during her natural life, of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."—§ 4269, *Comp. L.*

The territorial laws in force at the time the conveyance was made, required the wife to join with her husband in

WESTBROOK v. VANDERBURGH.

order to pass her estate in the lands.—2 *Territorial Laws*, § 4, p. 362. It is not shown or claimed in this case, that the plaintiff has done any act by which her right to dower in the lands conveyed would be barred, unless her acceptance under the provisions of the will amounts to such bar under the sections of the statute referred to. *Section 4286* is as follows: "If any lands be devised to a woman, or other provisions be made for her, in the will of her husband, she shall make her election whether she will take the lands so devised, or the provisions so made, or whether she will be endowed of the lands of her husband; but she shall not be entitled to both, unless it plainly appears by the will to have been so intended by the testator." *Section 4287* requires such election to be made within one year after the death of her husband.

The question raised, therefore, depends upon the proper construction of § 4286, and in arriving at this construction, we would do well to examine it in connection with the other provisions of this chapter. *Section 4269*, already quoted, entitles the widow to dower in all lands whereof her husband was seized of an estate of inheritance, "at any time during the marriage," unless lawfully barred thereof; while under the provisions of *Section 4286*, she is to make her election whether she will take under the provisions of the will, "or whether she will be endowed of the lands of her husband." The difference in the provisions of these two sections is noticeable at a glance. The term "lands of her husband" means lands of which he died seized, and can mean nothing else. If he had previously conveyed them, they would not be his lands. The conveyance would be good as against him, and conveys all his interest therein, so that the term could have no application to lands previously conveyed by him, and in which he did not have an estate of inheritance at the time of his death. The first section entitles her to dower in all lands whereof her husband was seized of the proper estate at any time

WESTBROOK v. VANDERBURGH.

during their marriage, unless lawfully barred thereof; but there is not such clear and comprehensive language in the latter section.

The supreme court of Pennsylvania, in construing a similar statute in a case like the present, said: "The truth is, no one can read these statutes, and those that have followed them of like import, without at once perceiving their operation was intended to be confined to lands an intestate had left to descend on his heirs, or a testator had given to his devisees. The simple absence of any direct expression indicative of a design to bring lands aliened within the purview of the enactments, ought, in itself, to be accepted as sufficiently proving no such design was entertained; for, surely, had the law-maker intended so important a change in the existing law, he would not have left it to a doubtful inference drawn from inconclusive reasoning."—*Borland v. Nichols*, 12 Pa. St., 42.

It is also insisted in this case, that one object in view, by the provisions of the statute already referred to, and also by § 4296, was to protect the heirs of the deceased from damages for a breach of the covenants contained in his conveyance, and if this could not be done, then the provisions of the statute would be futile. It is a sufficient answer to this to say, that the statute does not, either in express terms or by implication, attempt to protect the heirs from the effect of any such covenants, if they are liable thereon.

An argument has been based upon the fact that the property enjoyed by the plaintiff under the provisions of the will has been and is very valuable; that she had enjoyed it for some six years prior to the commencement of this suit, and that it would be unjust, therefore, to endow her in lands of which the defendant has for so long a period been seized and possessed. This, at first sight, seems plausible, but it is only so. It is but fair to presume that parties purchasing lands subject to dower, where the wife does not join in the conveyance, do not pay so much therefor as they would for a clear and unencumbered

WESTBROOK v. VANDERBURGH.

title, free from all such objections. The wife may not survive her husband, and if she should not, they have gained just so much by the transaction. They took the chances, and the result, in such a case, would be a favorable one. If, however, she survives her husband, still they have had the same use of the land during his lifetime they would have had upon payment of a full consideration, and they have also had the difference in amount between the consideration paid and what they would have paid had she joined in the conveyance. In other words, they, at the time of purchasing, concluded not to purchase her dower interest until after the death of her husband, with a possibility in their favor that they would obtain it, in case of her decease during her husband's lifetime, without purchase. Under such circumstances there is nothing unjust or inequitable in requiring them, upon the happening of the event contemplated, to then purchase from, or deliver up to, the wife her dower interest.

Had the husband, at the time he made the conveyance, received this increased consideration on account of her joining therein, we have a right to assume that she would have derived some benefit from it, either in the purchase of other real estate in which she would have had a dower interest, or in some other way, as a recompense for parting with her interest in the land.

For these reasons we are of opinion that the conclusion of the court below was erroneous; that the judgment must be reversed, with costs of both courts, and a judgment rendered in this court upon the special finding for her interest, as claimed in the declaration.

This being an action of ejectment, the record will be remanded for further proceedings under the statute.

The other Justices concurred.

HURD v. NEWTON.

Hiram D. Hurd and others v. Archibald P. Newton.

Rulings on evidence: Printed record: Objections abandoned. Objections to rulings on evidence, relating to a deposition which is not printed in the bill of exceptions, and others which are not noticed in the brief of plaintiffs in error, are not considered.

Question of fact: Submission to the jury: Lack of evidence: Error will not be presumed. Where one of three partners is defending against a draft, drawn in the firm name by one of his partners to be used to pay the individual debt of the third partner, the submission to the jury of the question whether he did not authorize the giving of the draft, or ratify it afterwards, will not be held to be error where it appears that he was himself questioned as a witness on this subject and answered fully, but none of his evidence is given in the record. Error will not be presumed.

Charge to the jury: Special requests. The refusal of special requests to charge is not error where the charge as given is full, clear and explicit on the points involved, and as favorable to the party complaining of it as the case would warrant.

Submitted on briefs January 18. Decided January 23.

Error to Cheboygan Circuit.

Atkinson & Atkinson, for plaintiffs in error.

Watts S. Humphrey, for defendant in error.

GRAVES, J:

Newton recovered below on a draft for three thousand dollars, drawn in his favor on Bickford & Co., of Chicago, and which was signed, Hurds & Smith, such being the firm name of the plaintiffs in error. It was in fact made by Hiram D. Hurd, with Smith's assent, and for Smith's individual debt, and this was known to Newton when he received it. The position of plaintiffs in error was, that Charles A. Hurd never in any manner gave his assent or sanction to the transaction, and that the firm were therefore not liable. Newton claimed, on the contrary, that Charles A. Hurd either actually authorized the giving of the draft, or at least subsequently assented to or confirmed it. The real contest at the trial was upon these opposing

HURD v. NEWTON.

claims. All the parties were made witnesses and their testimony was conflicting.

The record shows some objections to rulings on evidence, and particularly to several relating to a deposition, which the bill of exceptions refers to as a schedule annexed. But no such schedule is printed, and these objections, as well as others concerning the admission of evidence, are not noticed in the brief, and we therefore regard them as abandoned.

The firm of Hurds and Smith dealt in lumber at Cheboygan. H. D. Hurd, as one of the firm, attended to the books and the money matters at Cheboygan, and Smith looked after the business outside. He was likewise engaged on his individual account, in getting out lumber for the firm to a large amount, under a special arrangement, the particulars of which do not appear, and he had delivered a great quantity. On the other hand, he had been paid some four thousand dollars more than the lumber he had delivered amounted to. But a large amount of lumber which had been got ready, or nearly ready, for delivery, was expected to be delivered at an early day.

Charles A. Hurd lived at Buffalo, and could not be at once consulted. The whole evidence is not reported. It appears that Charles A. Hurd was asked whether there was any previous agreement under which the draft was given, and that he answered fully as to the point. None of this evidence is, however, given in the record, and we cannot judge of its import. We cannot say that it was not sufficient to require the circuit judge to submit to the jury, whether Charles A. Hurd did not authorize the drawing of the draft by the firm as a payment or advance by it to Smith.

Some slight evidence is reported of subsequent negotiations between the parties, concerning the assumption of the draft, and which, in view of the relations of the parties in their business operations, and the surrounding circumstances, was proper to be left to the jury, on the inquiry as to

HURD v. NEWTON.

whether Charles A. Hurd either authorized the draft, or afterwards acceded to its being a firm transaction.

Counsel for plaintiffs in error made several special requests, which were refused, and complaint is made of these refusals, and also of the charge as given. On examination of the charge we find it to have been full, clear and explicit on the points involved, and in view of the evidence which seems to have been given. And we cannot see that any thing more or different was required to enable the jury to find a true verdict. It would be a waste of time to cite the charge in connection with the evidence at length, and enter upon a minute commentary upon it. If fault was committed, it was not by the judge.

As no error is shown, the judgment must be affirmed, with costs.

The other Justices concurred.

Margaret McKinney v. William McKinney.

Equity pleading and practice: Premature decree: Notice of hearing. A decree entered within two weeks after the cause was put at issue, the record not showing that the cause was brought to a hearing by stipulation, or that the defendant was present at the hearing or had notice thereof, is held to have been prematurely entered.

Heard January 18. Decided January 23.

Appeal in Chancery from St. Clair Circuit.

This is a bill for divorce on the ground of cruelty.

Brown & Farrand, for complainant.

Atkinson & Stevenson, for defendant.

MCKINNEY v. MCKINNEY.

COOLEY, CH. J:

On the face of the record it would seem that the decree in this case was entered prematurely. The date is only about two weeks from the time the cause was put at issue, and it does not appear that the cause was brought to a hearing by stipulation. Neither does the decree recite the appearance of defendant at the hearing, or any notice of hearing to him. Under these circumstances we must reverse the decree, and send the case back for further proceedings. We shall not, however, award any costs.

The other Justices concurred.

Albert Staley v. The Township of Columbus.

Townships: Suit for unpaid taxes: Judgment: Tax-roll. A suit for unpaid taxes will not lie in favor of a township, except in the case provided for by statute, where taxes on personalty have been returned unpaid for want of property on which to levy. The tax-roll is itself as complete and adequate as an execution on a judgment would be, if there are goods and chattels within the treasurer's jurisdiction.

Townships: Treasurer: Taxes: Payment in worthless orders: Receipt: Settlement. Where a town treasurer has received from a tax-payer worthless highway orders in part payment of his taxes, receipting the taxes and returning them as paid, and in his settlement with the township board is allowed the amount thereof, the taxes are thereby paid, and any suit which is brought for the amount of the orders must be a private controversy between the treasurer and the party who paid them to him, and not a township action.

Heard January 18. Decided January 23.

Error to St. Clair Circuit.

Atkinson & Stevenson, for plaintiff in error.

Mitchell & Avery and *F. Whipple*, for defendant in error.

STALEY v. COLUMBUS.

CAMPBELL, J:

Staley was sued for unpaid taxes, and the foundation of the claim was, that he had given and the town treasurer had received two worthless highway orders in part payment of his taxes on real and personal property, the amount of such orders being fifty dollars, and the amount paid in money eleven dollars and seventy-six cents. The town treasurer gave receipts for the taxes and returned them as paid, and was allowed the amount in his settlement with the township board, who assumed the enforcement of the deficiency and directed the supervisor to bring suit.

Staley received the orders and paid them over in good faith. The illegality was not suspected by either party. Judgment was rendered against Staley for the amount of the deficiency.

The only case provided for by statute wherein suit may be brought for unpaid taxes by the township is where taxes on personalty have been returned unpaid for want of property on which to levy.—*C. L.*, § 1014. In such case the treasurer may sue in the name of the township. Taxes on real estate may be collected by distress on goods and chattels (§ 1003), but if not so collected the tax is returned unpaid and the land sold to make it.

The tax-roll is itself as complete and adequate as an execution on a judgment would be, if there are goods and chattels within the treasurer's jurisdiction. It would be a foolish ceremony to sue for land taxes when the land itself can be sold to pay them. But where personal taxes are unpaid, the debtor may have property subject to execution not open to seizure and sale by the treasurer, and a suit is in such case proper and necessary to secure payment. The statutory provisions are based on plain policy, and preclude the idea of suit in any case not named.

The statutes are very liberal in providing for extensions where taxes are not paid, and the treasurer could, by proper application and showing that these were unpaid, have ob-

STALEY v. COLUMBUS.

tained further time for collecting them or returning them as unpaid. These orders were received by him on the 15th of December. His warrant did not run out until the first of February, and might on a proper showing have been renewed or extended two months.—§ 1004. It does not appear by the record when he made his return. But by pursuing the course which he adopted he precluded the possibility of any further action by the public to collect the taxes, and became personally chargeable for them himself. The taxes were therefore in law paid, and not unpaid, and any suit which is brought for the amount of the orders must be a private controversy between the treasurer and Staley, and not a township action. How far Staley is indebted to the treasurer, if at all, is not to be determined in this cause.

The judgment must be reversed, and judgment entered for plaintiff in error, with costs of both courts.

The other Justices concurred.

Mary R. Loomis and others v. Edmund A. Brush and others.

Husband and wife: Deeds: Married woman's act. An ordinary quit-claim deed from husband to wife, executed and delivered prior to the married woman's act, is of no more validity as an actual conveyance in equity than at law; and a deed absolutely void in law when made, is not validated as a conveyance by the subsequent laws enabling married women to take and enjoy property as if sole.

Deed from husband to wife. Such a deed on its face is not only legally void, but is presumptively voluntary.

Equity jurisprudence: Husband and wife: Deeds. While courts will, under peculiar circumstances, carry out a purpose which has failed by reason of the incapacity of the wife to accept a deed from her husband, the case must be plain and the equity manifest; and an equity, too, springing from a clear right arising out of matters independent of the deed.

Registry: Void deed: Constructive notice: Equities. Such a deed being void, its record would not be notice to any one of any possible equities between the parties to it; to make such a record constructive notice of

LOOMIS v. BRUSH.

such equities, would be to make the recording of a void instrument more extensive in its operation than that of a valid one, which is only notice of what its terms show.

Bona fide purchasers. Purchasers of land the record title of which is free from any indication of a valid outstanding claim in any one, who hold a good legal title, combined with the full equities of *bona fide* purchasers without notice, cannot be disturbed in their rights without superior equities; and there are no equities superior to those of such purchasers.

Stale claims: Equity jurisprudence. Where pretended beneficiaries have slept upon their rights twenty or thirty years, and waited until it is far to assume important primary evidence will be difficult of access, they have no claim upon the indulgence of courts of equity; it would be dangerous to imperil the stability of titles by listening to such stale claims.

Submitted on briefs January 18. Decided January 23.

Appeal in Chancery from Wayne Circuit.

Jackson & Wisner, and M. E. Crofoot, for complainants.

1. A conveyance of real estate by deed from a husband to his wife, though void at law, may be sustained and enforced in equity: *Shepard v. Shepard*, 7 Johns. Ch., 57; *Hunt v. Johnson*, 44 N. Y., 27; *Sims v. Ricketts*, 35 Ind., 181, 192; *Dunning v. Williams*, 26 Conn., 226; *Burdeno v. Amperse*, 14 Mich., 96.

2. The record of this deed was notice to defendants: *Laws* 1833, p. 280; *Perry on Trusts*, 196, § 223.

3. By the deed of July 3, 1837, Frazard became the trustee or legal owner of the land, and his wife became the *cestui que trust*, or equitable owner of the same: *Perry on Trusts*, 21, § 38, and cases cited in note 4.

4. From October, 1843, until August, 1856, Francis J. Frazard had a life estate in these lands, and was tenant thereof by the curtesy. "Trusts have been made the subjects of the common-law canons of descent; they are deemed capable of the same limitations as legal estates, and curtesy was let in by analogy to legal estate:" 4 Kent Com., 315; 2 Story Eq. Jur., § 974, and note 2; R. S. 1838, p. 265; *Tong v. Marvin*, 15 Mich., 69.

5. Complainants are not barred by the statute of limitations: *Comp. L.* 1857, p. 1403, § 3, sub. 2; *Comp. L.* 1871, p. 1976, § 9; as to the statute of limitations, equity should follow the law: 52 Ill., 451; 7 Allen, 499; 48 Ga., 339; 32 Md., 151. The right to bring these proceedings did not accrue to the heirs of Mrs. Frazard until August, 1856, and at the death of the tenant for life: *Comp. L.* 1857, p. 1403, § 3, sub. 2. "A *cestui que trust* will not be barred from his right to relief by any length of acquiescence, unless he have an immediate possessory title to the beneficial interest:" *Hill on Trustees*, 392

LOOMIS v. BRUSH.

-3; *Perry on Trusts*, 781-2, note 1. If Frazard had conveyed to his wife in her lifetime, the deed would have been void at law: 30 *Mich.*, 328; and if a court of equity had compelled him to make the same conveyance during the life of his wife, the same would have been equally void.

6. Defendants took these lands with notice of the trusts, and charged therewith, and they are not entitled to the benefit of the statute of limitations: *Perry on Trusts*, p. 189, § 217, and cases cited in note 4, p. 762, § 828, p. 764, § 832, p. 768, § 840, note 5, p. 781, § 869, note 3; *Ernest v. Croysdell*, 2 *D. G. F. & J.*, 175; *Bridgman v. Gill*, 24 *Beav.*, 302; *Upham v. Wyman*, 7 *Allen*, 499. The case made by the bill does not show that defendants, or those under whom they claim, have denied the trust for more than twenty years, and held adversely; but, on the contrary, that they were not in a condition to deny the trust or hold adversely prior to the death of Francis J. Frazard in 1856. "No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate," etc.: *Comp. L.* 1871, § 4009.

7. Did the trust estate created by the deed of July, 1837, become executed and vest the legal estate in the heirs of Mrs. Frazard when the statute of uses of 1846 took effect?—*Ready v. Kearsley*, 14 *Mich.*, 228; *LaGrange v. L'Amoreaux*, 1 *Barb. Ch.*, 18; if so, then complainants have a remedy at law; otherwise their relief is in equity. A trust to be executed by the statute of uses of 1846 must be not only a simple or naked trust but it must be an express trust, as contradistinguished from a trust "arising or resulting from implication of law:" *Comp. L.* 1871, ch. 148, § 6. We submit that the trust raised by the deed in question is of the latter class and therefore not within said statute. See *Willard Eq. Jur.*, 419, 422; *Johnson v. Fleet*, 14 *Wend.*, 182.

Cleveland Hunt, Geo. O. Robinson, Geo. H. Penniman and G. V. N. Lothrop, for defendants.

1. A conveyance from husband to wife, before the act of 1855, was void: *Ransom v. Ransom*, 30 *Mich.*, 328.

2. Courts of equity act upon the analogy of the statutes of limitation, and will not entertain a suit for relief if it would be barred at law: *Story Eq. Pl.*, § 503; and our statutes are held applicable equally to suits at law and in equity: *Jenny v. Perkins*, 17 *Mich.*, 32; see also *Bruce v. Tilson*, 25 *N. Y.*, 195; *Stearns v. Page*, 7 *How.*, 819. If the time of the statute should not be applied from the death of Mrs. Frazard,

LOOMIS v. BRUSH.

as we think it should, it must be applied from the time when the title was conveyed to Joseph, March 24, 1853.

But, aside from the bar of the statute, long delay, when such as to make a claim *stale*, will be sufficient to induce a court of equity to refuse relief.

This suit is upon a ground that is purely *equitable*. It is to vindicate a right which had no existence at law; on which no right or claim could be made at law; and of which, we think, at the time at which it is claimed to have arisen, very few persons in the state, of any class, had any conception whatever. Indeed, the suggestion that, under our laws, any such right could arise, would not readily have been received.

It is fundamental with a court of equity, that its suitors can have relief only when relief is equitable; only when they have a case that can be sustained *in foro conscientiæ*. If for a long time they have failed to assert their equities, and circumstances have so changed that, now to aid them, would work injustice, courts of equity will not aid them.

In this case it is clear that the complainants have no *legal* rights, and never had; their rights, if any, are only rights in conscience, which equity might uphold.

These rights arose, if at all, July 3, 1837; on the death of the mother in 1843 they passed to her children, all then of mature age. For over thirty years no action was brought to assert them, and now they have been picked up and animated by the dealer in doubtful titles. In the meantime Frazard has died; *bona fide* purchasers of the legal title have intervened, some of whom have died, and the property, formerly of little value, has, by improvements and the growth of the country, become very valuable.

Under such circumstances, and after so long delay, as the complainants have no legal right, a court of equity cannot sustain an equitable right. This is fully established in this state and by many decisions elsewhere. We only cite the following: *Campau v. Chene*, 1 Mich., 400; *Campau v. Van Dyke*, 15 Mich., 379; *McVickar v. Filer*, 32 Mich., 304; *Ritson v. Dodge*, 33 Mich., 463; *Platt v. Vattier*, 9 Pet., 405; *Bowman v. Wathen*, 1 How., 189; *Wagner v. Batrd*, 7 How., 234; *Beaubien v. Beaubien*, 23 How., 190; *Badger v. Badger*, 2 Wall, 95.

In the case of *Badger v. Badger* the court said, that where the trust was *stale*, the bill should explain the delay, and show that there was good reason for it.

3. The only reason for any delay that is even hinted by the bill is, that Frazard had a life estate by the curtesy after the death of his wife. But to this we reply:

LOOMIS v. BRUSH.

(a) If any such estate ever existed, it certainly expired at his death, August 31, 1856, more than eighteen years before suit brought.

(b) As early as February 12, 1849, when he conveyed by warranty deed the fee to his son Joseph, it was apparent that he was claiming to be absolute owner, and in defiance of the supposed trust. The *cestui que trust* could then have come into equity to establish their rights, and the supposed estate by the curtesy would have been no obstacle: *Willets v. Mandlebaum*, 28 Mich., 522.

(c) But there never was any estate by the curtesy.

First, The matter of curtesy was then regulated by statute, and curtesy was given only on legal estates of inheritance—land of which she was “seized in her right of an estate of inheritance.” *R. S. 1838*, p. 265, § 18: see *Hathaway v. Lyon*, 2 Mich., 93; *Tong v. Marvin*, 15 Mich., 60.

Second, Even at common law there would have been no estate by the curtesy, for such an estate would have been inconsistent with the supposed trust. The trust set up is one which, in effect, is for the *sole and separate* use of the wife.

It is true that curtesy was allowed in trust estates of freehold of the wife: *Morgan v. Morgan*, 5 Madd., 408; *Cashburn v. Inglis*, 3 P. Wm., 234; *Davis v. Mason*, 1 Pet., 503. But where the trust was for the sole and separate use of the wife, no curtesy was allowed: *Hearle v. Greenbank*, 1 Ves., 298; *S. C.*, 3 Atk., 695-716; *Cockran v. O'Hern*, 4 W. & S., 95; 1 Washb. R. Pr., 130.

4. A careful examination of the principal decisions on this subject will show that courts are guided by principles fatal to the case of complainants. It will be found, in all cases, that the relief is granted directly between the husband and wife, or their immediate representatives, and without any long delay.

The following are the principal cases which we have been able to find where a direct gift or grant was made by the husband to the wife, and which, being void at law, has been set up as the basis of a trust in equity: *Lucas v. Lucas*, 1 Atk., 270; *Beard v. Beard*, 3 Atk., 72; *Moyse v. Gyles*, 2 Vern., 385; *Waller v. Hodge*, 2 Swanst. Ch., 92; *Slanning v. Style*, 3 P. Wm., 334; *Stott v. Ayliffe*, Rep. in Ch., 60; *Shepard v. Shepard*, 7 Johns. Ch., 57; *Garlick v. Strong*, 3 Paige, 440; *Newville v. Thompson*, 3 Edw. Ch., 92; *Wallingford v. Allen*, 10 Pet., 588; *Jones v. Oberchain*, 10 Grat., 259; *Hunt v. Johnson*, 44 N. Y., 27.

It is undoubtedly held that where the transaction is in

LOOMIS v. BRUSH.

itself meritorious, and the act is one which clearly separates the property and devotes it to the separate use of the wife, equity will uphold it to carry out the intent of the parties, provided no rights of creditors, subsequent purchasers, or children intervene, and also provided that no other circumstances intervene to affect the original equities.

There was no consideration for the deed here involved, beyond that of love and affection, and the meritorious one of making a reasonable provision for the wife. The money of the wife belonged to her husband when they took up their residence here, and as soon as he got possession of it, it became his absolutely.

5. The deed of Frazard to his wife was not within the recording acts, and its record was not constructive notice to any one. The deed was in law a nullity. It is only legal conveyances which are authorized to be recorded. The registry laws are a system for the record of instruments executed with prescribed forms, and affecting the legal title to lands. They do not at all contemplate mere equities. And an instrument which could have no legal operation as a deed of land has no more right to registry than a bill of sale of chattels, though executed with all the formalities which a deed would have. No legal effect can be given to an instrument which is a legal nullity: *Grimstone v. Carter*, 3 Paige, 437; *Walker v. Gilbert*, 1 Freeman Ch., 25; *Halsted v. Bank of Ky.*, 4 J. J. Marsh., 558.

And the principle that the record of an unauthorized instrument is no notice, has often been recognized in our courts: *Wing v. McDowell*, Walk. Ch., 182; *Dutton v. Ives*, 5 Mich., 515; *Galpin v. Abbott*, 6 Mich., 17; *F. & M. Bank v. Bronson*, 14 Mich., 361; *Buell v. Irwin*, 24 Mich., 145.

CAMPBELL, J:

Complainants file this bill as heirs, and grantees of heirs, of Maria Theresa Frazard, against several defendants who are purchasers, without actual notice, under title derived from her husband.

The bill sets up a purchase by the husband, Francis Joseph Frazard, in 1833, of a farm in Grosse Pointe, Wayne county, the purchase money whereof is alleged to have been paid by the wife out of her own money, brought over from France, where they had formerly resided. The land was

LOOMIS v. BRUSH.

taken in the husband's name, and it is not charged to have been done fraudulently or improperly, and the family lived on the land until the death of Mrs. Frazard, in 1843.

It is alleged that Mrs. Frazard afterwards insisted that as the purchase money had been paid out of her funds, she ought to have a part of the land secured to her, and that on the third day of July, 1837, her husband made an ordinary quit-claim deed to her of the southwest half of the premises, which was recorded in the county registry, July 17th, 1837.

Mrs. Frazard died in 1843. Mrs. Loomis, the complainant, is her daughter, and the other complainants are her grandchildren. In 1869, all the other heirs, except certain children of Sophia Frazard (who was a daughter of Mrs. Frazard and died in 1851), conveyed their rights to the husband of Mrs. Loomis, and he conveyed the same to his wife.

The defendants all claim under a warranty deed made by Francis Joseph Frazard to his son Joseph Frazard, February 12th, 1849, and recorded the next day.

The bill, admitting and averring the legal invalidity of the conveyance, claims that it be held valid as creating a trust to Mrs. Frazard's separate use, descending to her heirs. No notice is set up to any one of the defendants except through the record of the deed.

It is very well settled that such an instrument is of no more validity as an actual conveyance in equity than at law, and that in order to work out an equity, there must be a clear right arising out of matters independent of the deed, as well as some further conveyance or release compelled, to carry it into effect as an agreement or obligation. If the deed was made under circumstances which would have rendered it proper for equity to compel the husband to carry out a trust in his wife's favor, the only way under the old system would have been to require a sufficient conveyance to trustees if the wife was living, or to the beneficiaries if she was dead. There can be no ground for claiming that

LOOMIS v. BRUSH.

a deed absolutely void in law when made is validated as a conveyance by the subsequent laws which enable married women to take and enjoy property as if sole. And there can be no pretense that the deed could stand alone either at law or in equity, without an inquiry into the circumstances, to enable the court to determine whether any equity arose concerning it. There are no presumptions in its favor. On its face it is not only legally void, but presumptively voluntary, and contains nothing to indicate that it was given for any meritorious purpose. While courts will, under peculiar circumstances, carry out a purpose which has failed by reason of the incapacity of the wife to accept a deed from her husband, the case must be plain and the equity manifest.—*Shepard v. Shepard*, 7 J. C. R., 57. Even under our laws for the protection of the separate estates of married women, conveyances from husband to wife were never valid until the act of 1855.—*Ransom v. Ransom*, 30 Mich., 328.

The deed being void, its record was no notice to any one of any possible equities between husband and wife. If such equities existed, they did not grow out of the deed, and were not embodied in it. To allow the record to be constructive notice in such a case, would be to make the recording of a void instrument more extensive in its operation than that of a valid one, which is only notice of what its terms show.

The purchasers found the record free from any indication of a transfer which bound any one, and they unquestionably hold a good legal title, combined with the full equities of *bona fide* purchasers without notice. Such rights cannot be disturbed without superior equities, and there are no equities superior to those of such purchasers.

It is unnecessary to consider the questions arising under the statute of limitations, as the title is not maintainable under any circumstances against these purchasers. But apart from any statutory defense, if applicable, the bill was not filed until thirty-three years after Mrs. Frazard's death,

LOOMIS v. BRUSH.

and twenty-five years after the conveyance to Joseph Frazard, and about twenty years after his father's death. No reason is given for the delay, and where pretended beneficiaries sleep so long upon their rights, and wait until it is fair to assume important primary evidence will be difficult of access, they have no claims upon the indulgence of courts of equity. It would be dangerous to imperil the stability of titles by listening to such stale claims, which must be presumed unfounded when not urged within some reasonable time.

The demurrers were well taken, and the bill was properly dismissed.

The decree must be affirmed, with costs.

The other Justices concurred.

Nancy D. Osborn v. Ira Osborn and others.

Partnership: New firm: Assuming debt of original firm: Promise to third person. Where the creditor of a firm, holding firm notes, sues a new firm, composed of two members of the original firm and a third person to whom the third member thereof has sold out his interest under an arrangement that the purchaser should assume his share of the partnership liabilities, basing her right of action on the assumption by the new firm of her debt against the old, and a promise to her to pay it, it is error to treat the case as one coming within the principle of cases where a plaintiff counts on a promise made to a third person.

Partnership: Dealing with creditors: Notice: Husband and wife. Whatever is done by one member of a partnership in the course of the business, is presumed to be known to the others; and this presumption applies just as strongly to the acts of a partner who is the husband of a creditor of the firm, in his dealings with his wife as such creditor, as to his dealings with any other creditor.

Partnership: New member: Assuming debts: Creditors: Accepting new firm as debtor. The new member having covenanted, as between himself and the retiring partner, to pay the latter's share of the partnership liabilities, and the new firm having made payments on the plaintiff's claim, and the retiring partner having assigned to plaintiff all claim he might have against such new member on the agreement between them, and the plaintiff having thereupon brought this suit against the new firm, these

OSBORN v. OSBORN.

facts, appearing in evidence, would be sufficient to fairly warrant a jury in finding that plaintiff had accepted the new firm as her debtor in place of the old, and had consented to the substitution which the several partners among themselves had agreed upon.

Submitted on briefs January 18. Decided January 23

Error to St. Clair Circuit.

Chadwick & Voorheis, for plaintiff in error.

Brown & Farrand, for defendants in error.

COOLEY, CH. J:

In this case the plaintiff was creditor of the firm of Osborn, Forsyth & Co., composed of the defendants Osborn and Dole and James Forsyth, and held their notes for the debt. Forsyth sold out to John R. Taylor, who by written agreement undertook to assume Forsyth's share of the partnership liabilities. The business was afterwards continued by Osborn, Dole and Taylor for about a year, when the partnership was dissolved by consent. During the time the new partnership continued, interest was paid by it to the plaintiff on her claim, and the payments were entered on the partnership books. Other debts of the old partnership were also paid by the new firm. After the dissolution of that firm, plaintiff brought suit against its members, declaring generally on the common counts, and also specially on the assumption by the new firm of her debt against the old, and the promise to her to pay it. Forsyth had previously assigned to plaintiff all claim he might have against Taylor on the agreement between them which is above stated.

The circuit judge thought the case came within the principle of *Pipp v. Reynolds*, 20 Mich., 88; *Turner v. McCarty*, 22 Mich., 265; and *Halsted v. Francis*, 31 Mich., 113. In each of those cases the plaintiff counted on a promise made to a third person, not to himself. In this

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OSBORN V. OSBORN.

case the plaintiff counts upon a promise made to herself, and the only question is, whether she establishes it.

That the new firm assumed the debt and made payments on it, is clear enough. Some reliance is placed on the fact that the financial man of the concern was the defendant Osborn, who was the husband of the plaintiff, and that it was not shown that the other defendants had personal knowledge of the payments made by him. But this is immaterial. Whatever is done by one member of the partnership in the course of the business must be supposed to be known to the others. And this presumption applies just as strongly to the acts of Osborn as to the acts of either of the others. The relationship to the plaintiff was of no importance whatever to the question of his authority to act for the firm.—*Moore v. Foote*, 34 Mich., 443. In justice to the parties, however, it ought to be remarked, that no circumstances of secrecy appear in the action of defendant Osborn, and it is reasonable to suppose that what he did was understood by his partners.

There is certainly evidence that the plaintiff accepted the new firm as her debtor in place of the old, and that she did not expect to hold Forsyth liable further. Her arrangement with him, and the bringing of this suit, are facts from which a jury would be fairly warranted in finding a consent to the substitution.

The judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

COLWELL v. KEYSTONE IRON COMPANY.

Henry J. Colwell and others v. The Keystone Iron Company.

Sales: Delivery: Lumber: Measurement: Inspection: Title. Where a debtor has turned out to a creditor in payment of the debt certain specified piles of lumber, which were designated and marked, and put into the charge of a person who accepted the duty, for the vendee, though in the general employ of the vendor, the transaction amounts to a completed sale and transfer of the title, though the amount was to be ascertained by future measurement and the purchase price to be determined by future inspection, the vendee to pay any excess of the purchase price over his debt, and the vendor to make good any deficiency.

Agency: Two principals: Acceptance of delivery. There is no principle of law which precludes a person from acting as agent for two principals. And it is competent for a person in the employ of the vendor, to accept, by consent of all parties, as the agent of the vendee, the delivery of the property sold; and the agency of the keeper concerning the lumber in such case would be single throughout.

Transfer of possession: Contract of sale: Revocable bailment. The transfer of the possession of property by the vendor to the purchaser to be held by him until future measurements and computation should be made, though not under circumstances such as to make the sale a completed one at the time, would nevertheless give a right of possession which could not be revoked by the vendor or any one having no superior rights; possession given under any contract for contract purposes is rightful as between the parties, and not a mere revocable bailment.

Heard January 19. Decided January 23.

Error to Marquette Circuit.

Ball & Owen, for plaintiffs in error.

Mitchel & Pratt and *W. H. Park*, for defendant in error.

CAMPBELL, J:

The Keystone Iron Company sued below in replevin, to recover certain lumber, claimed to have been purchased from the Michigan Iron Company by parol contract, and delivered. The plaintiffs in error, who were defendants below, claim to hold the lumber by general assignment, executed by the Michigan Iron Company for the benefit of creditors.

COLWELL v. KEYSTONE IRON COMPANY.

The controversy, therefore, involves no questions which would not have arisen between the two companies had there been no assignment. The only contest on the merits is, whether, as against the Michigan Iron Company, possession could have been asserted by the plaintiff below, who was allowed by the rulings of the court and determined by the finding of the jury to prevail as so entitled.

Upon the facts as they must have been found by the jury, the Keystone Iron Company held a demand against the Michigan Iron Company for four thousand dollars, and required payment. The debtor company had a lot of iron ore received from the Keystone company, which was alleged to be unsatisfactory. A bargain was made verbally, to receive back this ore at an agreed price, which was done, and to pay the remainder in lumber. Having estimated what balance would be due, several piles of lumber were designated and set apart for that purpose, and it was agreed that if found excessive the Keystone company should pay for the excess. If deficient, the Michigan Iron Company was to pay the deficiency. At first an average price of eleven dollars per thousand feet was agreed upon, which was afterwards changed to varying prices for the several qualities of common, dimension, and clear. The piles were designated on a diagram of the yard and subsequently marked, and were put in charge of a person who accepted the duty, by consent of the Michigan Iron Company, in whose general employment he was engaged at the time.

The finding of the jury rests upon the unquestionable facts that there was a distinct verbal agreement that the whole lumber in the specified piles should at once pass at agreed prices to the purchaser, who was to become owner of all of it, that the piles were designated and set apart specifically, and that they were by mutual consent put in the charge of a specified agent as the property of the vendee.

We are very much at a loss to imagine what more could be done to complete the delivery and acceptance of property such as was here disposed of. It was only capa-

COLWELL v. KEYSTONE IRON COMPANY.

ble of constructive delivery, and it was not only distinctly set apart from all the rest of the lumber in the yard, but it was also put in charge of a keeper. Under these circumstances the objections to the validity of the sale are entirely groundless, and require no serious consideration. The whole amount was sold absolutely, and to be absolutely paid for. Nothing was necessary to identify the property sold, and the intention to transfer it at once was manifest. The subsequent measurement and inspection were only necessary to ascertain the price, but were not necessary to pass the title, in the face of a contrary intent. The case falls within the principle of *Adams Mining Company v. Senter*, 26 Mich. R., 73, not only as to the question of title, but also upon another point suggested, that a person could not at the same time act as agent for two principals. In the present case, however, the agency of the keeper, concerning the lumber in controversy, was single throughout, and if the point had any force it would not apply here.

We may also remark that if the possession of the lumber was transferred to the purchaser, to be held by him until the future measurements and computations should be made, we are not aware of any principle which would make a possession any less valid, against the vendor himself, because the sale might be incomplete. Possession for purposes of future disposal under a bailment designed to secure the bailee payment out of the property or its proceeds, could not be disturbed by the bailor. Possession given under any contract for contract purposes, is rightful as between the parties and those who have no superior rights.

While, therefore, we regard the instructions of the court as correctly holding the transactions in controversy to have made a valid sale of the lumber, we think there would have been no error had the sale been incomplete, where possession was given and received by the purchaser for the purpose of retaining the whole, and where the vendor was under no circumstances to receive back any part of the lumber. If it had been no more than a peculiar bailment, it was not a revocable bailment.

COLWELL v. KEYSTONE IRON COMPANY.

We have not referred specifically to the particular rulings complained of, because the court only authorized a finding for the plaintiff below upon the conditions which, in our judgment, made up a completed sale. The charges were much more favorable to the plaintiffs in error than they were entitled to.

Objections were made to the reception of certain testimony of the sayings and doings of various agents of the parties. They could not have affected the issue in the case, and therefore we need not discuss them. We have not discovered any error in the rulings, but we regard them as not material.

The judgment must be affirmed, with costs.

The other Justices concurred.

Warren H. Jeudevine and others v. Henry A. Rose
and others.

Sureties: Future mercantile engagements: Time: Withdrawal: Discharge.
Sureties in a bond given to secure performance by their principal of future mercantile engagements, and in which no period of limitation of liability is fixed, who have notified the obligees that they will no longer be bound for future transactions, are held discharged from liability for transactions thereafter entered upon, where no change in circumstances by the obligees has occurred on the faith of a longer continuance of the suretyship, and they are not prejudiced by such withdrawal.

Submitted on briefs January 19. Decided January 23.

Error to Clinton Circuit.

Spaulding & Cranson, for plaintiffs in error.

Walbridges & Fedewa, for defendants in error.

GRAVES, J:

Defendants in error, as co-partners under the style of *Rose*,

JEDEVINE v. ROSE.

French & Losey, were dealers in musical instruments in Clinton and some other counties. They were supplied with pianos, organs, etc., by C. J. Whitney & Co., of Detroit.

In November, 1874, they agreed with Jeurdevine to supply him with such instruments, and in connection with that arrangement, he, with the Taylors as his sureties, executed to Rose, French & Losey this bond:

"Know all men by these presents, that we, Warren H. Jeurdevine, of Mount Pleasant, Isabella county, Mich., and Joseph K. Taylor, and William Taylor, and Aaron B. Taylor, of St. Johns, Michigan, are held and firmly bound unto Rose, French & Losey, of St. Johns, Michigan, in the sum of two thousand dollars (\$2,000) lawful money of the United States of America, to be paid to the said Rose, French & Losey, or to their certain attorneys, heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, heirs, executors, and administrators, and each and every of them firmly by these presents.

"Sealed with our seals and dated the 3d day of November, one thousand eight hundred and seventy-four.

"The condition of this obligation is such that, whereas, it has this day been agreed between the said Jeurdevine and said parties of the second part, that parties of the second part shall sell to said Jeurdevine the C. J. Whitney & Co. pianos at thirty-five per cent. less than the published catalogue price, with freight added from Detroit, to be sold by said Jeurdevine in the counties of Isabella, Gratiot, and Clare, Michigan, and which the said Jeurdevine is to pay said parties for, either in cash or in good bank notes, with ten per cent. interest, payable not more than one year from date of note, which note or notes shall be given fifteen days after shipment of said pianos. Also the Packard organ to be sold in said counties by said Jeurdevine, and for which he is to pay said second parties at a price thirty-five per cent. less than list prices, with freight added from Fort Wayne, Ind., either in cash or good bank notes with ten per cent.

JEDEVINE v. ROSE.

interest, payable in not more than six months from fifteen days after date of shipment of said organs; also the Estey organ, to a limited extent, to be sold in said counties by said Jעדevine, and for which he is to pay said second parties at a price thirty-five per cent. less than the published list price and freight added, either in cash or good bank notes, with ten per cent. interest, payable in not more than three months from the first day of the month next following date of shipment, provided that the amount due from said Jעדevine to said second parties shall at no time exceed two thousand dollars.

"Now, therefore, if the said Jעדevine shall well and truly keep and perform his said agreement, and said notes given by said Jעדevine shall be paid at maturity, so that said second parties receive payment in full for all said instruments at the time hereinbefore specified, then this obligation to be void, otherwise in force.

"WARREN H. JEDEVINE. [Seal.]
WM. TAYLOR. [Seal.]
A. B. TAYLOR. [Seal.]
J. K. TAYLOR. [Seal.]"

December 17, 1874, Rose, French & Losey sold and delivered to Jעדevine under this arrangement an Estey organ and took his note therefor, which was afterwards paid.

Subsequently and prior to January 11th, 1875, and before any further sales were made to Jעדevine under the arrangement, the sureties on the bond called on Rose, French and Losey, and forbade their making further sales to Jעדevine on the credit of the security, and gave notice that they would not be responsible on account of any such further sales.

Notwithstanding this notice the defendants in error, on January 11th, 1875, sold and delivered to Jעדevine on the footing of the original arrangement three other organs, and took his note for the price, being four hundred and two dollars and twenty-five cents. This note was made payable to the order of C. J. Whitney & Co., at the First National

JEDEVINE v. ROSE.

Bank of St. Johns, May 1st, 1875, and carried interest at ten per cent.

On its receipt by Rose, French and Losey, they endorsed and sent it to C. J. Whitney & Co., to be credited on account, and in due season C. J. Whitney & Co. sent it forward with their endorsement, for collection, and it not being paid by Jevdevine or the sureties, Rose, French and Losey took it up.

No other sales were made on the basis of the arrangement.

Rose, French and Losey then sued upon the bond to recover the amount of this last mentioned note.

The cause was tried without a jury, and the judge found the foregoing facts, and decided as matter of law, that the defendants in error were entitled to recover, and judgment was entered pursuant to the finding.

The charge of error is, that the facts do not support the judgment.

The chief question is upon the effect of the notice by the sureties to the defendants in error.

Plaintiffs in error claim that upon the facts as found the notice exempted the sureties from liability on the bond for the subsequent sales for which the note was given.

Defendants in error maintain the contrary.

In considering the point our attention must be confined strictly to the precise state of facts presented.

Very slight differences might require a different opinion.

It is certainly not admissible to say that the primary agreement between Jevdevine and defendants in error was designed to continue without any limit as to duration.

The parties thereto must have contemplated some time or event not very remote for its termination.

But no such time or event is mentioned, and the intention as to the duration of liability of the sureties is left entirely uncertain by the wording of the bond.

Where such is the case in regard to instruments of suretyship given to secure performance of futuro mercantile

JEUDEVINE v. ROSE.

engagements, the courts lean strongly to a construction which will confine the liability in point of time within reasonable bounds.

The rule when fairly applied is sensible and just. In case the parties have failed to manifest, in what they have said and done, a design that the liability is to continue indefinitely, it is not to be presumed that so extraordinary a risk was meant to be exacted on one side or voluntarily taken on the other.

To admit a contrary inference would be to suppose on general principles that the parties taking security sought what was not reasonable for them to ask for, and that the sureties were regardless on their part of the suggestions of interest and the dictates of ordinary prudence.

Defendants in error stipulated for no specific time, neither did the sureties bind themselves for any.

Of course the past could not be recalled. As to transactions already had, there could be no withdrawal. Accrued liability could not be canceled.

Still, in the absence of obligation for a continuance of liability in point of time, there would seem to be no reason for precluding a withdrawal as against transactions in no way entered upon, and considering the situation of the parties and that a continuing liability in time was not specified, it would seem a reasonable and just construction, that as to transactions not yet initiated, not as yet in existence, the guaranty was meant to be at the will of the guarantors, and to be subject as to such matters to be ended by a manifestation of their will to that effect through actual notice.

There is nothing to show that any change of circumstances by defendants in error occurred on the faith of a longer continuance of the suretyship and whereby they would suffer injury by a withdrawal of the security at the time notice was given. There is no ground for raising any consideration of that kind.

The transactions in question were all had after full notice and in the face of an express declaration that the sureties

JEDEVINE v. ROSE.

withdrew and would not be responsible for further dealings, and there is not a fact to show that any thing whatever had been done towards the transactions before the notice, or that defendants in error had changed their position in contemplation of the further continuance of the guaranty, or, indeed, that the retirement of the sureties prevented the collection of the note. So far as the case shows, the whole business in question was begun and ended after the notice and with full knowledge that the sureties refused to be liable, and, moreover, nothing appears to show that Jeudevine is not himself responsible for the claim. In view of the actual state of facts, we think it should be held that the guaranty ceased to be current after the notice, and inoperative as to transactions thereafter entered upon, and that the sales on which the note was given should be deemed as sales made on the credit of Jeudevine, and not on the security of the bond.

The judgment should be reversed, and one entered here for plaintiffs in error, with costs of both courts.

The other Justices concurred.

Andrew J. Welch v. William Marvin.

Promise to pay for goods furnished to another: Original undertaking: Statute of frauds. Defendant having gone to plaintiff and orally stated to him that for such goods as he should thereafter furnish to a third person named he would pay him, it is held that to take the promise out of the statute of frauds and make the defendant legally liable it is essential that plaintiff should thereupon have absolutely discharged such third person from liability, and looked only to defendant for payment; under no circumstances could he hold each liable severally, at his option.

Heard January 19. Decided January 23.

Error to Ionia Circuit.

WELCH v. MARVIN.

Sessions & Strickland and A. B. Morse, for plaintiff in error.

Lemuel Clute, for defendant in error.

MARSTON, J:

Marvin, who was plaintiff below, brought an action of assumpsit to recover the value of certain meat furnished by him to be used in a boarding train upon the D., L. & L. M. R. R. It appears from the testimony that one Hiram Cook, who was engaged in keeping such boarding car, had obtained his supply of meat from the plaintiff, and in June, 1875, was owing him for meats furnished one hundred and seventeen dollars and seventy-eight cents; that about the 14th of June he refused to trust Cook any longer or furnish him with any more meat unless some different arrangements were made; that Welch, who had been supplying Cook with groceries, went to see Marvin, in company with Cook, to make some arrangement about this matter. Marvin testified that he (Welch) then said: "This pay is now assigned over to me from the railroad company, and I am going to become responsible for the meat, and I want meat to run this train, and what meat you let Cook have from now, I will pay you for." Marvin then told Welch that Cook had got meat there from the middle of April up to the 1st of June, that had not been paid for, and that he would not let any more meat go until he was paid for that; that Welch replied: "Well, you get an order on me from Cook, and I will accept that order, and pay you as fast as the money comes into my hands to pay that." The next morning an order was drawn up for the one hundred and seventeen dollars and seventy-eight cents; this order was accepted by Welch, providing money enough came into his hands from the company to pay his own account first, the balance to be paid on this order. Different amounts were paid by Welch, in all amounting to two hundred and fifteen dollars; but it does not appear that any other orders were

WELCH v. MARVIN.

given. It also appeared from plaintiff's testimony that he, in September, received an order from Cook on the railroad company for one hundred dollars, which he endeavored to collect. After the arrangement made with Welch, plaintiff continued to charge the meats thereafter delivered to Cook, in the same manner he had previously done, no change having been made on his books in the manner of keeping the account. There was considerable conflicting evidence, as is usually expected in such cases, as to what the agreement really was, as to the reason of continuing to charge the meat to Cook upon plaintiff's books, and the efforts made to collect the account.

The court, in charging the jury, very properly left it to them to find what the agreement between the parties actually was, and the conclusion to be drawn from such finding. Defendant's counsel requested the following instructions to be given: "If the jury find that Marvin sold meat to Cook and charged the same to Cook, and that Welch became responsible for it, in order to take the promise out of the statute of frauds, and make Welch legally liable, they must also find that Marvin thereupon absolutely discharged Cook from liability, and looked only to Welch for pay." Other instructions having a similar tendency were requested to be given. These requests were refused, the jury being merely instructed that the manner of keeping the account, and efforts to collect from Cook, were facts capable of explanation, and might be considered by the jury. We are of opinion that defendant was entitled to have the jury instructed as requested. Under no theory of this case, could Cook and Welch both be responsible to plaintiff, severally, at his option. If Cook was liable for the meats furnished after the arrangement with Welch was made, then clearly Welch's liability could not be an original one. It is equally clear, that if Welch's promise was an original promise, and the debt his debt, then Cook could not be held liable thereon. The parties might have made an agreement under which they would have been jointly liable, which is not claimed in

WELCH v. MARVIN.

this case. But they could not, under the circumstances, be severally liable, at plaintiff's option. We know of no better test than this, in a case like the present.—*Bresler v. Pendell*, 12 Mich., 224; *Gibbs v. Blanchard*, 15 Mich., 292; *Corkins v. Collins*, 16 Mich., 480.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Robert Yelverton v. Mathew Steele.

Taxation: Supervisor's certificate: Review: Date: Time: Presumptions.

Under a statute allowing three days for review of the assessment roll, where the sessions are not required to last later in the day than five o'clock in the afternoon, the fact that the supervisor's certificate to the roll is dated on the last review day, does not necessarily show that it was premature, for it would be competent for him to attach his certificate on that day and after the hour specified; and all reasonable presumptions must be indulged in favor of official regularity.

Taxation: Equalization of valuation: State tax. The amount of state and county taxes levied in the several townships depending on the equalization of valuation required by the statute to be made by the board of supervisors, it is as important, as between the several townships, that this action should be taken, as is a separate valuation of estates, as between individuals; and failure to comply with this requirement invalidates the tax.

Records: Informal action not recorded. The statute requiring the action taken by the supervisors in this regard to be entered upon the records, informal action which is not recorded will not answer the requirement; conjecture is inadmissible where the statute requires a record.

Taxation: State tax: Amount: Apportionment: Basis of estimate. An objection, that the tax on the face of the roll appears to be excessive, is not considered, in the absence of competent evidence what state tax was apportioned to the township, there being no basis for an estimate.

Heard January 19. Decided January 23.

Error to Ingham Circuit.

Spaulding & Cranson, for plaintiff in error.

Lucien Reed, for defendant in error.

YELVERTON V. STEELE.

COOLEY, CH. J:

The validity of a tax-title for the year 1864 is the question at issue in this suit. The tax-sale was made for the state tax alone. Three objections are made to the title.

I. That the supervisor's certificate to the assessment roll was premature; it being dated on the third day allowed by law for reviewing the assessment roll and making objections thereto.—*Laws of 1858, p. 178.* The argument is, that being made on the third day, it did not allow the full three days for objections which the statute gives. The case of *Westfall v. Preston, 49 N. Y., 349*, affords some support to this objection, but we think the statutes differ so much as to render that case inapplicable. Under the New York statute it would seem that one whole day was given for the review; under our statute, three are allowed, but only until five o'clock P. M., after which it would seem entirely competent for the supervisor to attach his certificate. We must presume, in favor of official regularity, that he did not attach it prematurely.

II. That there was no lawful equalization of the several township assessment rolls by the board of supervisors.

The statute required the board of supervisors, if they should deem the valuation of real estate in the several townships to be relatively unequal, to "equalize the same by adding or deducting from the valuation of the taxable property in the township or townships such an amount as in their judgment will produce relatively an equal and uniform valuation of the real estate in the county, and the amount added to or deducted from the valuation in each township shall be entered upon the records." As the amount of state and county taxes levied in the several townships will depend on this equalization, it is as important, as between the several townships, as would be a separate valuation of estates, as between individuals. In this case the statute was not complied with. No such record as the statute requires was made, and no formal action whatever appears to have

YELVERTON v. STEELE.

been taken by the supervisors to equalize the rolls at all. There is, indeed, a column of figures where under the head of "equalized valuation" the sum of one hundred and forty-eight thousand dollars is set opposite the name of this town; but that this sum is the result of any action by the supervisors does not appear, and conjecture is inadmissible where the statute requires a record. The defect is fatal.

III. A further objection was made, that the tax on the face of the roll appears to have been excessive. This we shall not consider, as there was no competent evidence showing what state tax was apportioned to this township, and consequently no basis for an estimate.

The defendant appears to have claimed some rights by possession, but the facts on which the rights depend are not found.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

John Scriven v. William H. Moote.

Foreclosures: Chancery sales: Growing crops: Purchaser. The purchaser at a foreclosure sale in chancery becomes the owner of the crops then growing upon the premises.

Chancery foreclosure sales: Growing crops: Previous parol agreements: Purchaser. The mortgagor cannot sustain any claim to wheat growing on the lands at the time of a foreclosure sale in chancery, on a disputed showing that the purchaser at such sale before held the legal title to the lands and was under a parol agreement to make certain advances and hold the land as security, where it is not claimed he was under any obligation to remove the incumbrances under which the foreclosure decree and sale was made; granting that the rights of such purchaser were before the sale no more than those of a mortgagee, he was not precluded thereby from purchasing at such sale and acquiring all the rights that any other purchaser would; and that sale cut off all previous equities of the mortgagor.

SCRIVEN v. MOOTE.

Chancery foreclosure sale: Purchaser: Bill to redeem: Bond for injunction:

Title: Growing crops. The giving of a bond by the mortgagor, under the requirement of an order of the court, as a condition to the granting of an injunction against proceedings by such purchaser to get possession under his foreclosure title, conditioned to prosecute his bill to redeem to final decree, and if the decree should be adverse, to pay a fair rental value for the premises, and to pay all taxes and all legal costs, and not to commit waste, could not operate, in the absence of any showing of an acceptance of the bond by the obligee or of any action taken or claim made under it, to deprive him of any of his substantial rights as purchaser in the premises or the crops growing thereon.

Heard January 19. Decided January 28.

Error to Clinton Circuit.

This is replevin brought by Scriven for some wheat which was growing on premises before owned and then occupied by Moote, when Scriven purchased the premises on a chancery foreclosure sale, through which the latter claims to have derived title to the crop. Scriven held title to the lands before the foreclosure sale, through an execution sale, and Moote claimed to have had an oral arrangement with him prior to such sale whereby he was to reconvey his title to Moote on repayment of his advances and interest; and after the foreclosure sale he filed a bill to redeem. This bill came before this court on appeal, and is reported in *33 Mich.*, at page 500, where it was held there was no sufficient evidence of any bargain at all, even a parol one, for a reconveyance; that whatever may have been the state of things before, the chancery sale cut off all previous equities, and that Scriven had a right to buy at such sale and to hold the lands the same as any other person.

Pending the bill to redeem, Moote was required, as a condition to the granting of an injunction in his favor against proceedings by Scriven to obtain possession under his foreclosure title, to give bond to prosecute his bill to redeem to final decree, and if the decree should be adverse, to pay a fair rental value for the premises, and to pay all taxes and all legal costs, and not to commit waste. This is the bond of July 7, 1874, referred to in the opinion of

SCRIVEN v. MOOTE.

the court. The verdict and judgment below were for defendant, and plaintiff brought error.

O. L. Spaulding, for plaintiff in error.

H. Walbridge and *J. O. Selden*, for defendant in error.

MARSTON, J:

At the time this case was argued and submitted, my impressions were that Moote might, under his oral arrangement with Scriven, made previous to the foreclosure sale in April, 1874, have some claim to the wheat in question, sowed under such arrangement and previous to such sale. An examination of the record, and of the decision of this court, in *Moote v. Scriven*, 33 Mich., 500, upon the validity and effect of such oral agreements and of the sale of April, 1874, convinces me that defendant can have no such claim.

In the case referred to, it was held that there was not only no evidence of a bargain conforming to the statute of frauds, whereby Moote was to have any interest, but that there was not convincing proof of any bargain at all, and that whatever may have been the state of things before, the chancery sale cut off all previous equities; that whatever the previous arrangement may have been, Scriven was not obliged to buy in the property at the chancery sale to save what he had previously paid out, and even if he had been a mortgagee, he was not thereby precluded from buying up such title and holding it like any other purchaser, inasmuch as it was a legal sale of the mortgagor's equity, which any one could buy, unless estopped.—*Comp. L.*, § 5154.

The purchaser at this sale, there being no redemption, became the owner of the crops then growing upon the land, and it is not claimed that he at any time afterwards became divested of the title thus acquired, or did any act which would preclude him from maintaining this action. It is claimed, however, that the bond of July 7, 1874, has such effect. We do not think so. The only authority

SCRIVEN v. MOOTE.

requiring such bond to be executed to Scriven and filed with the register was an order of the circuit court in chancery in the case of *Moote v. Scriven*, already referred to. Scriven never accepted this bond or made any claim under it, and the utmost effect that can be given to it, would be to give Scriven an additional remedy. The order under which it was given did not pretend to and could not well deprive Scriven of any of his substantial rights in the premises. True, the injunction in connection therewith might postpone them, but upon its removal, all Scriven's rights were restored.

As the rulings below were not in accordance with what is here said, the judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

APRIL TERM, 1877.

Abel Bills v. William Keesler.

Chattel mortgages: Certified copy: Evidence: Form of certificate. A certificate of the township clerk, attached to a copy of a chattel mortgage, that it is a true and compared copy of the original on file in his office, and of the whole of such original, is sufficient to entitle the copy so certified to be received in evidence.

Certificates: Form: Certified copy: Chattel mortgages. The form of certificate indicated by the statute (*Comp. L. 1871, § 5931*), viz.: that the copy certified is a true transcript compared by the officer with the original in his office, is not designed to be an exact and exclusive form which shall preclude all others; but a certificate which complies in substance with what is here required is sufficient; and another statute (*Comp. L. 1871, § 4711*) provides for the certification of copies of chattel mortgages, etc., filed with township and city clerks, and a certificate which complies with this statute is sufficient.

Heard and decided April 3.

Error to Newaygo Circuit.

This was trover, brought by defendant in error in justice's court, and taken by *certiorari* to the circuit court. The judgment in justice's court was for the plaintiff, which was affirmed in the circuit, and the defendant brings error. The point raised is sufficiently stated in the opinion.

William D. Fuller and *J. H. Standish*, for plaintiff in error.

James Barton and *Gray & Luton*, for defendant in error, were stopped by the court.

PER CURIAM:

The only question on this record is, whether the court below erred in receiving in evidence what purported to be a

BILLS V. KEESLER.

certified copy of a chattel mortgage filed in the office of the township clerk. The objection is, that the certificate is not in exact verbal conformity with the form indicated by the statute.—*Comp. L.*, § 5931. We think, however, the substance of what is there required appears in this certificate; and that is sufficient. It may be doubted whether that statute is designed to require one general form for all cases; there is room for supposing that the purpose was only to indicate a certificate that should be sufficient, but without precluding certificates which, but for this statute, would have been good. Another statute (*Comp. L.*, § 4711) seems to provide for the certification of these copies, and under that, this certificate would be sufficient without doubt.

Judgment affirmed, with costs.

The People on the relation of The Auditor General v. The Supervisors of Monroe County.

State and county: Taxation: Taxes returned as delinquent. Where taxes have been regularly assessed and returned, the responsibility of the county to the state on account thereof is fulfilled, and the county is discharged from further duties.

Taxes: State and county: Accounting with the state: Delinquent taxes: Payment. Under the tax system of this state all unpaid taxes which are returned as delinquent belong to the state, and the counties have no further concern with or control over them, except in case any tax is found to be illegal and is set aside by the proper state authority in the manner pointed out by law; and every dollar of taxes returned unpaid in due course of law is a payment to that extent of the debts due from the county to the state, and the accounting between county and state is upon this basis.

Statute construed: Retroactive effect: Collection of taxes: Title. The provision in the tax law of 1899 (*Comp. L. 1871, § 1090*) directing lands remaining unsold for five years after they were bid off to the state to be sold for what they would bring, crediting the county for any excess, and charging it for any deficiency, is held not to be retrospective. While as a matter of future policy this provision might fairly be considered as a means of ultimate collection, by making the county a guarantor, not

AUDITOR GENERAL v. SUPERVISORS OF MONROE.

only of the validity of the taxes, but also of the marketable value of the security, and thus be within the title of the act, "to provide for the uniform assessment of property, and for the collection and return of taxes thereon," yet its purpose, if given retrospective effect, is different, and not within the purview of such a title.

State tax-bids: Accounts between county and state. The legal effect of this provision, if retrospective, is to authorize the state arbitrarily to shift off on the county its bad bargains in tax lands, and compel the county,—not to take them at their cost,—but to make up the deficiency arising on the sale by the state itself, and over which the county has no control. And its result is to require those who have already paid their taxes, to be taxed over again for the default of others, who may in turn have profited by their own default, by bidding in their lands for less than was levied against them.

Accounts between county and state: Taxes: Injunctions. The state is not authorized to charge back to the county because of injunctions any taxes which have been returned as delinquent, until they have been rejected or held invalid by some competent authority; though if the injunctions were issued under circumstances which left authority in the auditor general to reject them for illegalities, and he actually rejected them for adequate causes, the fact that he did not wait for a decree would not be important.

Heard January 8. Decided April 4.

Application for *mandamus*.

A. J. Smith, Attorney General, and Charles Upson, for relator.

J. Ronan, I. R. Grosvenor and E. Willetts, for respondents.

CAMPBELL, J:

The auditor general applies for a *mandamus* to compel the county of Monroe to raise a state tax to refund to the state a balance struck against the county, which includes, among other things, a loss on state tax-lands sold for less than their cost, and also the amount of certain taxes the collection of which was stayed by injunction. These two principal items are contested, together with certain smaller sums of interest. It is claimed that the act of 1869, whereby provision was made for charging back to the county the losses on state tax-bids cannot be allowed to justify the charges in this case, and that the enjoined taxes were not lawfully charged back. Both of these questions involve an

AUDITOR GENERAL V. SUPERVISORS OF MONROE.

inquiry into the theory and practice of state taxation; and the relative positions of state and county to each other in their financial dealings.

With some trifling exceptions, all county liability to the state must arise from state taxes for state purposes. It is only because these taxes are collected through the same processes with the local charges that any mutual debts and credits can arise. The state laws prescribe the methods of assessment, and the extent and manner of levying all these charges, the practical work being mostly done by neither state nor county, but by township officers, who make the valuations and apportion to each tax-payer his share of the burdens which they are required to lay upon the property on the rolls. As the validity of all the taxes chiefly depends on the regularity of the action of these subordinate officers, it is usually the case that a regular assessment will sustain the state tax, and that an irregular one will defeat it. The counties being the only municipal bodies directly communicating with the state, the responsibility for regularity is chiefly laid upon them, and irregularly laid taxes may in general, if set aside, be charged back to the counties for re-assessment in some form. But where taxes have been regularly assessed and returned, the responsibility of the counties is fulfilled, and they are discharged from further duties. No county has any means of compelling redress against township officers whose action is regular in form,—whether honestly or dishonestly performed; and the reason for imposing any duty on the counties is not based on the idea that they are able to regulate matters, but upon somewhat arbitrary rules of convenience to the state.

As each tax roll directs specifically what taxes are to be collected of each tax-payer for state, county, and local purposes, if all the persons charged were residents and possessed of tangible property, no great complications would be likely, and the moneys would be speedily collected and paid over at once where they belong. But our laws are framed on the theory that a considerable number of tax-payers will

AUDITOR GENERAL v. SUPERVISORS OF MONROE.

not pay their taxes to the township collecting officer, and that both township and county, as well as state taxes, will have to be enforced by other agencies.

Assuming that all the taxes on every roll are presumptively of equal validity, the rule adopted has been to allow the town treasurer to retain the whole amount due to his office out of his collections before requiring him to pay any money to the county treasurer, and in like manner to allow the county treasurer to retain enough to pay all county taxes before paying over any money to the state. So that where town and county taxes are thus satisfied the whole balance belonged to the state and is enforced for the benefit of the state, although nominally including some county and township taxes in lieu of the same amount of state taxes collected and retained by township and county.

If the business has been regularly done, the taxes returned uncollected and the moneys paid over to the state at the proper return day, will precisely balance the amount of state taxes laid against the county. If enough has not been collected to pay township and county taxes, then by the return the state becomes a debtor to the county for the deficiency, but the unpaid taxes all belong to the state. And in pursuance of this same theory, although returned taxes for state, county, and town purposes are all charged with a high and uniform rate of interest, in the nature of a penalty for delay, only ten per cent. of this is allowed to the county for so much of the aggregate as is necessary to make good the county deficiency which the state is to assume, and all the rest belongs to the state. The county is charged with the state tax and credited with all moneys paid by its treasurer and all taxes returned unpaid. It has no further concern with, and no control over any of the unpaid taxes on its own account; and if any of them are subsequently paid to the county treasurer, they belong to the state and must be so accounted for.

There is but one case in which the county has any subsequent interest in the returned taxes. It is responsible to

AUDITOR GENERAL V. SUPERVISORS OF MONROE.

the state for their regularity, and in case any tax is found to be illegal, and set aside by the proper state authority in the manner pointed out by law, so that the state does not receive its amount, then it is charged back to the county as so much previously credited without consideration, and the county is bound to make it good.

Every dollar of taxes returned unpaid in due course of law is a payment to the same extent of the debts due from the county to the state,—and the law has always required annual statements and balances of accounts to be struck on this basis. Every tax legally set aside is charged as a new item of indebtedness. But until 1869 no provision was made for charging back any other items connected with taxes. The balances carried over from year to year in accordance with law, could only be changed to the extent of these specific deductions for void taxes.

The tax sales have in all cases been regarded as interesting no one but the state. While usually made by the county treasurers, yet they made them under state authority, and unless they gave satisfactory bonds to the auditor general, the duties connected with the sales were performed by other persons employed by the auditor general for that purpose. No funds could be received for bids except such as were legally receivable at the state treasury.

No county or county officer ever had authority to bid at the sales or in any way to control them except on behalf of the state. No parcel could be sold to a private bidder for less than the whole taxes and charges, and lands not purchased by private parties were required to be bid in for the state.

Lands bid off by the state could be redeemed like other lands, and if not redeemed were open to sale at the annual tax sales; and if not sold after five years they were no longer assessable until sold or discharged from the taxes.

In all these proceedings the state purchased and held in the same manner as individuals, and a state tax-bid transferred to a private purchaser was in his hands in all respects

AUDITOR GENERAL v. SUPERVISORS OF MONROE.

like a title bid off by himself originally. The tax was extinguished by the sale, and the title was good or bad according to its regularity.

In 1869 a statute was passed for revising the tax law, which contained in section 124 a direction that lands remaining unsold for five years after they were bid off to the state should be sold for what they would bring, any excess over the amount charged against any parcel to "be placed to the credit of the county in which such parcel of land may be situated; and if any parcel of the land so offered shall be sold for less than the amount for which it was bid off to the state, then the proper county shall be charged with the difference between the sum for which such parcel was so sold and the amount for which it was originally bid off to the state."—*C. L. 1871, § 1090*. This section was repealed without any saving clause in 1875.—*L. 1875, p. 270*.

It is claimed by relator that this section was retrospective, and the charges in controversy rest on that claim, which is disputed by respondents, who also insist on its invalidity if so construed.

The statute of which the section formed a part was an independent and entire law, entitled "An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon." Any provision which would be of any use in carrying out taxation to its results in the complete disposal of property may, in a certain sense, be within such a title. But it would be going very far to hold that where taxes have been finally satisfied, and the property bid off on a tax-sale, a provision could be properly included which had no relation whatever to the collection of taxes, and only referred to the sale of a certain class of state tax-lands which had been owned for many years, and were to be disposed of at any price which they would bring. As a matter of future policy, it might fairly be considered as a means of ultimate collection, by making the county a guarantor, not only of the validity of the taxes, but also of the

AUDITOR GENERAL V. SUPERVISORS OF MONROE.

marketable value of the security. But its purpose, if retrospective, is different.

The law assumes that the tax-sales have been valid, and that the county has therefore levied all the taxes it was required to levy, and that these have been satisfied by payment or sale. It assumes further that the accounts have been adjusted on that theory, and that as to those taxes no debt exists against the county. The legal effect of the section, if retrospective, is, that the state arbitrarily shifts off on the county its bad bargains in tax-lands, and compels the county,—not to take them at their cost,—but to make up the deficiency arising on a sale by the state itself, and over which it has no control. And its result is to require those who have already paid their taxes to be taxed over again for the default of others, who may in turn have profited by their own default, in bidding in their lands for less than was levied against them.

It has already been held by this court that provisions in this same statute which made radical changes in the rights of parties should be treated as prospective.—*Clark v. Hall*, 19 Mich., 356; *Smith v. Auditor General*, 20 Mich. R., 398. In both of those cases the title of the statute was regarded as evidently prospective. In most of its features the statute does not seriously differ from the laws it displaced, and would create no disturbance in pending proceedings. But where any section gave ground for changes which entirely revolutionized the old system, in regard to the most important rights and liabilities under tax-sales, it could not be made applicable to proceedings which were no longer executory, without making its title very inappropriate, and bringing it within the mischiefs aimed at by the constitutional provision, which confines statutes to the purposes indicated by their titles.

Without considering the power of the legislature to enact such provisions retrospectively, we think this section is not to be given such effect.

In regard to taxes charged back because of injunctions,

 AUDITOR GENERAL V. SUPERVISORS OF MONROE.

there is nothing in any tax law which allows any taxes to be so charged back until they have been rejected or held invalid by some competent authority. If the injunctions were issued under circumstances which left authority in the auditor general to reject them for illegalities, and he actually rejected them for adequate causes, the fact that he did not wait for a decree would not be important. But no tax can lawfully be charged back until it has been set aside legally by some competent authority.

As to the interest charges complained of, we are unable on the record to discriminate the charges, so as to know on what basis they are made up. Most of them, we suppose, depend on the matters already disposed of. We cannot discuss them without further light.

As the accounts will all have to be re-cast, the *mandamus* must be denied.

The other Justices concurred.

 Sylvester Slater v. Jacob W. Breese and others.

Mortgages: Description of premises: Identification: Evidence. Omitting to name the state, county, and township, in the description of premises in a mortgage, will not invalidate the instrument, where other adequate elements of identification exist; and it is not essential that the property should be so described as to identify it without the aid of extrinsic proofs, but it is always competent to connect the written description with the material subject matter by proof of the surrounding circumstances.

Description of premises: Identification: Incorrect description. Where there are descriptive signs satisfactorily ascertained which designate the thing meant to be granted, the addition of circumstances or accompaniments which are untrue will not defeat the grant, but they will be rejected.

Mortgages: Incorrect description: Foreclosure bill: Correct description. Where a mortgage is inaccurate in its description of premises, and has some elements that have to be rejected as surplusage, but the description is nevertheless sufficient, in the light of the extrinsic facts, to identify the property intended, it is proper in a bill to foreclose the

SLATER V. BRESEH.

mortgage to describe the property actually mortgaged by a description which is accurate; and the variance in terms from the description in the mortgage is unimportant.

Amendments at the hearing: Foreclosure bill: Subsequent mortgages. The right to grant amendments at the hearing in the court of first resort is much broader than in an appellate court, and is more a question of terms than of power, where the amendment is germane to the controversy and calculated to help to a better or more complete result; and where the complainant in a foreclosure bill held subsequent mortgages not referred to in his bill, and the answer of a defendant brought in as a subsequent incumbrancer referred to such intervening mortgages, and based asserted equities upon their existence, it is competent to permit complainant to so amend his bill at the hearing as to make it aver the facts as to these mortgages.

Equity pleading and practice: Application to take further proofs: Amendments. Upon an application for further time to take additional testimony upon the subject matter of amendments to the bill and answer made with leave at the hearing, the showing should point out what facts were expected to be proved, so that the court could determine upon their relevancy and importance. And where a party has failed in his showing for time to take proofs out of court, permission to him to take further proof in open court at the hearing, being a provision to that extent in his favor, will authorize no complaint on his part.

Mortgages: Second and third mortgagees: Intermediate grant: Subject to first mortgage. The statement in a deed from an intermediate holder of a portion of the premises covered by a mortgage, that the grant is subject to such mortgage, in the absence of any requirement that the grantee assume and pay the same, will not make the mortgage a specific charge upon the portion or interest granted by such deed, so as to influence the equities as between second and third mortgagees upon other portions of the mortgaged premises.

Mortgages: Foreclosures: Order of sale: Second and third mortgages. It is a maxim of equity, that where one has a lien on two funds, and another a later lien on one of them, the former is bound to exhaust the singly charged fund before resorting to that which is doubly charged; but this maxim will not aid a third mortgagee of a portion of the premises covered by the first mortgage to drive the first mortgagee to sell first a parcel on which he also holds a second incumbrance and which is not included in the third.

Mortgages: Foreclosure: Decree: Order of sale: Subsequent mortgages. Where a portion of the mortgaged premises is covered by a second mortgage held by the complainant, and another portion by a third mortgage held by a defendant, the latter cannot complain that on a bill to foreclose the first mortgage the decree provides for the sale first of the parcel covered by the second mortgage, but requires the sale of that parcel to be subject to the payment of the second mortgage.

Order of sale: Third mortgage: Second mortgage: Amount. A third incumbrancer who concedes the existence of a second incumbrance is not entitled as matter of right, upon the question of the order of sale upon foreclosure of the first mortgage, as between the parcel covered by his incumbrance and that covered by the second incumbrance, to introduce proofs to show that the amount of the second incumbrance is less than it is represented to be.

Foreclosures: Report of amount due: Decree: Excess: Appeal: Exceptions. Where the amount due upon a mortgage foreclosure has been found and reported by a commissioner to whom the case was referred for that pur-

SLATER v. BREESE.

pose, and the court in decreeing the amount has acted on such report, a defendant who has taken no exception and made no objection to the report, cannot on appeal assail the decree as being excessive in the matter of the allowance of interest.

Heard January 9. Decided April 4.

Appeal in Chancery from Lenawee Circuit.

Weaver & Welsh and *A. L. Millard*, for complainant.

Stacy & Underwood and *Walker & Weaver*, for defendant Breese.

GRAVES, J:

The printed record in this case is replete with inconsistencies and inaccuracies, and especially in regard to dates, and much embarrassment has been consequently experienced in threading the details. The material facts are, however, believed to be sufficiently ascertained and understood to authorize conclusions upon the merits.

The bill was filed April 26, 1875, to foreclose a mortgage made July 29, 1867, by the defendants Theodore and Joseph Rogers to one Sarah L. Ashley, and by her assigned to complainant June 11, 1868. It would seem that Mrs. Ashley conveyed the premises to the mortgagors by deed dated July 24, 1867. The mortgage embraced a little less than fifty acres, and comprised three irregular shaped, but contiguous parcels, and one of these parcels included premises called the grist-mill lot or property, of a little more than three acres with a mill and its appurtenances, a saw-mill lot lying very near, of a little over an acre and a half, and also a piece of a few rods in extent, called the piece between. Before hearing, the cause was discontinued as against the defendant Wright. As to the rest of the defendants, except Dye and Breese, the bill was taken as confessed. Dye answered, and it appeared he had no interest except as to a parcel of about five and a half acres on one end of one of the three great parcels in the mortgage. He had bought this, with other lands, of defendant McOmber, and his posi-

SLATER v. BREESE.

tion was, that Mrs. Ashley released it from the mortgage before she assigned to complainant. The court sustained this defense and finally dismissed the bill as to Dye. Breese answered, and claimed, among other things, that March 7, 1870, the defendant Emma Sweet mortgaged to the defendant Joseph Rogers all the premises in the Ashley mortgage except the two mill lots and appurtenances, the piece between, and the Dye parcel of five and a half acres; that this mortgage was assigned to him by Rogers; that he foreclosed under the statute in 1872 and became the purchaser and went into possession, and has since held possession and used and improved the property.

July 24, 1876, foreclosure was granted and Breese appealed. The controversy is confined to complainant and Breese, and Breese's right to contend is based finally upon his interest under the subsequent mortgage. He is a subsequent incumbrancer of a portion of the premises claimed to be embraced by the mortgage sought to be foreclosed. There is no equity between co-defendants to be settled. The questions made relate to the description in the bill and mortgage, the relative equities of complainant and Breese in the matter of working out a satisfaction of complainant's mortgage through sale of the property in that mortgage, and the propriety of certain proceedings in the cause. It is perhaps best to dispose of the points concerning the description at the outset. It is objected, in the first place, that there is a fatal variance between the description in the bill and in the mortgage, and in the second place, that there is an entire lack of description of the land in the mortgage. This last objection may be first considered.

The grounds of the objection are, that no town, county or state is mentioned, or any circumstance or thing referred to, to fix the location, and that in regard to the first and second descriptions, no commencement is given.

It is not essential to the validity of a grant that the property should be so described as to avoid the necessity of an appeal to extrinsic proofs to apply the grant to the

SLATER v. BREESE.

property. The subject matter must undoubtedly be so earmarked in the grant as to be capable of being distinguished from other things of the same kind. But it is always competent to fix and identify by extrinsic proof the natural monuments and other badges of identity and connect the description in the deed with the material subject matter dealt with by it.—*Blake v. Doherty*, 5 *Wheat.*, 359; see also *Wilson v. Boyce*, 2 *Otto*, 320.

The property to be granted may have a particular name by reputation, and if so it may be described by such name, without giving monuments, boundaries or the like.—*Goodenow v. Curtis*, 18 *Mich.*, 298; *Sargent v. Adams*, 3 *Gray*, 72; *Woods v. Sawin*, 4 *Gray*, 322; *Gerrish v. Towne*, 3 *Gray*, 82; and outside evidence may be resorted to, to apply the name to that which it signifies. Indeed, the instances are rare in which no help whatever is required. If the means are given in the grant, either by a name of notoriety or by specified monuments and other definite particulars, to identify the thing meant to be granted, with the aid of outside examination and proof to fix and determine the monuments and other particulars or connect the name with the thing, the description is *prima facie* sufficient.

And omitting to name the state, county and township will not prejudice, where other adequate elements of identification exist.—*Russell v. Swezey*, 22 *Mich.*, 235; *Atwater v. Schenck*, 9 *Wis.*, 160; *Mecklem v. Blake*, 19 *Wis.*, 397; *Pursley v. Hayes*, 22 *Iowa*, 11; *Ives v. Kimball*, 1 *Mich.*, 313.

It is also well settled that if there are descriptive signs satisfactorily ascertained which designate the thing meant to be granted, the addition of circumstances or accompaniments which are untrue will not defeat the grant. They may be rejected.—*Worthington v. Hylyer*, 4 *Mass.*, 196. This principle is confirmed and its application illustrated in numerous cases. Among others, see the following: *Ives v. Kimball*, 1 *Mich.*, 308; *Anderson v. Baughman*, 7 *Mich.*, 60; *Loomis v. Jackson*, 19 *J. R.*, 449; *Jackson v. Marsh*,

SLATER v. BREESE.

6 Cow., 281; *Jackson v. Clark*, 7 J. R., 217; *Doe v. Roe*, 1 Wend., 541; *Hathaway v. Power*, 6 Hill, 453; *Gouverneur v. Titus*, 1 Edw. Chy. R., 477; *Peck v. Malams*, 6 Seld., 509, per *Johnson, J.*; *Hannum v. Kingsley*, 107 Mass., 355; *Lyman v. Loomis*, 5 N. H., 408; *Barnard v. Martin, Id.*, 536; *Johnson v. Simpson*, 36 N. H., 91; *Smith v. Strong*, 14 Pick., 128; *Doane v. Willcutt*, 16 Gray, 368; *Thatcher v. Howland*, 2 Met., 41; *Hull v. Fuller*, 7 Vt., 100; *Law v. Hempstead*, 10 Conn., 23; *McChesney v. Wainwright*, 5 Ohio, 453; *Eggleston v. Bradford*, 10 Ohio, 312; *Stringer v. Young's Lessee*, 3 Pet., 320; *Barclay v. Howell's Lessee*, 6 Pet., 498; *Lodge's Lessee v. Lee*, 6 Cranch, 237; *Parker v. Kane*, 22 How., 1.

Now it is quite plain that the descriptive part of complainant's mortgage has some inaccuracies, but it is equally plain that the terms of the description when taken together are abundantly sufficient, with such aids as are admissible, to identify the land.

There are several monuments and particulars given, and they are arranged in definite space relations to distinguish the exact location and define the premises, and no other place in the world could be found marked out by such a combination of features. We have two highways, the river Tiffin, a bridge, a ravine, the south line of Power's land, certain lines of sections, and these are spaced off, one from another, by course and distance.

Then the description represents the land as being on sections one and twelve in township eight south of range one east.

When we come to traverse these sections to find the land, we discover the river, the two highways, the ravine, the bridge, and Power's south line, all arranged in the relative positions indicated.

We turn to the mortgage and find the first and second descriptions have the same starting point, and that both parcels are capable of being run out as one. At the same time we notice that such starting point is the quarter stake.

SLATER v. BREESE.

on the southwest corner of the southeast quarter of a section, but that the conveyancer either omitted the number of the section, or by mistake called it number "eight." An examination of the phraseology and of the government lines and the land marks given in the mortgage and found on the ground at once explain the matter and show that the number of the section was left out and that the word "eight" was intended as the number of the township. Bearing in mind that the first and second parcels have the same starting point, to-wit: the quarter stake on the southwest corner of the southeast quarter of a section, we observe that according to the description of the second parcel, there is a call for a highway at the end of the first course, and also for one at the end of the second course, and for the centre of the Tiffin river at the end of the fourth, whilst the fifth is required to run near the centre of that river and the sixth to terminate at Power's south line. These marks are found, and it becomes clear that the starting point for the two parcels was meant to be at the quarter post on the southwest corner of the southeast quarter of section one.

The ascertained particulars imperatively require section one as the section containing the quarter at the corner of which the quarter post mentioned is situated.

It is still objected that where the mortgage gives the sections, township and range, it places the first parcel on the west half of the northeast quarter of twelve, whereas the other terms place it on the east half of the northwest quarter, and that it also places the second parcel on the west half of the southeast quarter of section one, instead of the east half of the southwest quarter, where it is claimed to be.

The landmarks given in the mortgage, and the facts found on the ground, conclusively identify the property without resort to these superadded circumstances, and it is demonstrated that the conveyancer, in attempting to give the exact eighty-acre lot, blundered. And it is only necessary to reject the

SLATER v. BREESE.

expression "the west half of northeast quarter of" in regard to the first parcel, and the expression, "on the west half of southeast quarter of," in connection with the description of the second parcel, to render the description consistent and sufficient. That it is proper to reject these unnecessary and discordant circumstances, is sanctioned by overwhelming authority. See cases cited.

There are still other considerations which ought not to be overlooked in view of the position held by the defendant Breese. In the first place this mortgage and several grants of parts of the property, and which grants the defense has all along assumed to be of parts of the property, were all recorded as grants of lands situated in Lenawee county, and some of them identified the location with entire correctness. Moreover, the whole drift of the answer points to the very same property; and defendant's mortgage, the mortgage under which he raises this defense, not only follows the same courses and gives the same monuments and particulars, but actually brings to notice the existence of the grist mill and saw mill within the general lines, by an exception, and the answer at last asserts that defendant has been in actual possession of the unexcepted portion for many years under his mortgage, whilst the witness facts of the two descriptions so tally as to forbid argument that the two mortgages do not identify the same land.

The objection of defendant against the description in complainant's mortgage is hence totally untenable.

The bill describes the same land, but with accuracy, and the objection of variance is of course without merit.

The answer suggested the existence of some equities by defendant against complainant, in consequence of certain grants and releases given before defendant's mortgage and before the inception of the title on which it is based. But this claim is very properly not insisted on.

Before proceeding further it is necessary to explain somewhat, and more or less repetition can hardly be avoided.

We have already seen that the mortgage sought to be

SLATER V. BREESE.

foreclosed was made in 1867, and was assigned to complainant in June, 1868; that the premises were described as three principal parcels, upon one of which was a grist-mill property, a saw-mill lot and a small piece between, and that another embraced a piece of about five acres and a half released to McOmber by Mrs. Ashley before she assigned the mortgage to complainant.

We may now notice the later incumbrances acquired by complainant and defendant.

January 25, 1868, Joseph Rogers granted an undivided half of the grist-mill property to Parker, and this interest through mesne conveyances was vested in Sarah Smith, January 17, 1870, at which time she, with Myron Smith, mortgaged it to complainant, the mortgage purporting to be for twelve hundred and fifty dollars, on interest at ten per cent.

October 11, 1869, Theodore Rogers granted the other undivided half of the grist-mill property to Joseph Rogers, and he, in November of that year, granted it to Joseph and Sarah Bemenderfer, and they at that time mortgaged it back to Joseph Rogers, this mortgage purporting to be for fifteen hundred dollars, with interest at ten per cent. January 18, 1870, Joseph Rogers assigned it to complainant. March 7, 1870, Joseph Rogers quit-claimed to Emma Sweet, and she thereupon gave her mortgage to him on all the property described in the mortgage in suit, except the grist-mill property, the saw-mill property, the piece between, and the five acres and a half which had been released to McOmber. June 18, 1872, Joseph Rogers assigned this mortgage to defendant Breese.

From what has been said it appears that complainant owned the mortgage in suit, covering all the three great parcels except the piece his assignor had released to McOmber, and that in January, 1870, by means of the two mortgages given by the Smiths and Bemenderfers, he acquired a second incumbrance on that part or portion of the premises in his first incumbrance designated as the grist-mill property, and that afterwards and in June, 1872, the de-

SLATER v. BREESE.

defendant acquired the later mortgage made by Mrs. Sweet in March, 1870, on all the premises in complainant's first mortgage except this property covered by complainant's second incumbrance, and except also the saw-mill property, the piece between, and the released five and a half acres.

In this state of things, Breese proceeded in 1872 to foreclose this Sweet mortgage by advertisement, and he became purchaser on the sale, and in due time, as would seem, received his deed and went into possession and thereafter kept it.

When complainant came to file his bill in April, 1875, he took no notice of his second incumbrance under the Smith and Bemenderfer mortgages on the grist-mill property, but proceeded as though the only incumbrance he held on any part of the three great parcels was the mortgage assigned to him by Mrs. Ashley. The bill was in the usual form to foreclose that mortgage and for no other relief.

In answering, Breese set up his mortgage made by Mrs. Sweet, his foreclosure and possession, and stated that there were "sundry other mortgages upon some parts of the lands in said bill described, to a considerable amount;" that the other parcels of land covered by complainant's mortgage had been sold and conveyed before the premises he held under the Sweet mortgage; that in case of sale on complainant's mortgage the parcels ought to be sold in the inverse order of their alienation; and at last asked that the securities might be marshaled according to the respective rights of the parties, and that sales might be made in such manner as to accord with the rules established in such cases, and that his premises might be last sold.

A general replication was filed, and the cause was carried on upon these pleadings to the time for hearing, in July, 1876.

In the meantime, however, complainant proceeded to foreclose his mortgages on the grist-mill property, by advertisement. He commenced a few days after the bill was filed, and the premises were struck off to him August 2,

SLATER v. BREESE.

1875, and deeds were made and filed, as seems to be conceded, in pursuance of the statute. The undivided half covered by the Bemenderfer mortgage was bid off at nineteen hundred and eighteen dollars and eighty-three cents, and the other at nineteen hundred and sixty-nine dollars and fifty-eight cents.

In the progress of the cause Breese seems to have adduced documentary evidence of his incumbrance under the Sweet mortgage and his foreclosure, and complainant seems to have been allowed, but against Breese's objection, to give similar proof of his junior incumbrance on the grist-mill property under the Smith and Bemenderfer mortgages, and of his proceedings to foreclose those mortgages during the pendency of the suit. At length, when the cause stood for hearing, or at least when defendant so understood, and on the 17th of July, 1876, the court, in view of the circumstances and of defendant's claim that the incumbrances on the property should be marshaled agreeable to equity and that the parcels might be exposed for sale in the inverse order of their alienation, or in such manner as to require a sale of the grist-mill property before resorting to that covered by defendant's incumbrance, granted complainant leave, against Breese's objection, to set forth by amendment of the bill the fact of his being second incumbrancer of the grist-mill property under the Smith and Bemenderfer mortgages, and further, that he claimed that the property should be sold in such manner as not to impair his rights as such incumbrancer of that portion of the property in his first mortgage.

The order allowing this amendment of the bill also gave Breese leave to answer the new matter within five days, and directed that the cause should stand over for further hearing until July 24th, and that he might take further proof within that time, or take the same in open court on such further hearing. The bill having been amended pursuant to the order, Breese acted upon the leave to answer further, and on the 22d of July filed his amendments. He

SLATER v. BREESE.

set up on information and belief that the Smith and Bemenderfer mortgages were made "for a much larger sum than is or was ever due or payable thereon; and that as nearly as he could learn about eight hundred dollars thereof was for usury, and was to cover a bonus to said complainant; that large sums of money had been paid by the mortgagor and others to complainant thereon, which had not been allowed or credited, and that much had been paid for delay." He further set up the purchase of complainant on the statutory foreclosures; that the amount claimed to be due and bid by complainant was one thousand dollars too much; that it was insisted that he, defendant, could not redeem, and that the sale would become absolute August 2, 1876, and after which no right would exist to require the grist-mill property to be sold on the mortgage in suit; that the undivided half deeded to Mrs. Smith, and on which she gave the mortgage to complainant, was charged in the deed she received with the mortgage in suit, and that the other undivided half came to the Bemenderfers charged in like manner, and of which facts complainant had notice, and hence, that those mortgages ought not to be held a prior lien to that of defendant, except to the amount actually unpaid upon them, exclusive of costs. The amendments further claimed that before complainant could be entitled to avail himself of the Smith and Bemenderfer mortgages in this case, he must first relinquish all claim to any rights growing out of his statutory foreclosures, and bring the mortgages into court and submit all the equities in relation thereto, and in relation to his first mortgage, and in relation to the rights of defendant, to the court.

When the cause came up for further hearing on the 24th of July, pursuant to the order, Breese moved on his affidavit, that the hearing might be postponed for sixty days to enable him to procure additional proof. He stated in his affidavit that under the amendments to the bill, Joseph Rogers was a material and important witness for him, and that he could not safely proceed to the hearing without his testimony,

SLATER v. BREESE.

as he was advised by his counsel, after stating to them what he expected and believed he would be able to prove by said Rogers, and that he believed such advice to be true; that as he was informel, said Rogers resided in California, and that his personal attendance or testimony could not be procured in less than from forty to sixty days. The court refused to grant the postponement. Breese was then placed upon the stand by his counsel, who offered to prove by him that the amount claimed to be due on the Smith and Bemenderfer mortgages, and that for which the premises were bid in, was much larger than the real consideration; that the amount called for by the mortgages, when given, was much more than the amount of money which the mortgagors received; that four hundred dollars had been paid on each, which had never been endorsed, and the offer concluded with a proposal to prove the facts in the amendments to the answer. Under objection of complainant's counsel, the offer was refused.

These various proceedings are made grounds of complaint. In disposing of the points it will not be needful to advert to all the answers which are open.

It is objected that the amendments of the bill were not such in their nature as it was competent for the court to permit at the hearing.

We think differently. Counsel appear to have been misled by referring to rulings touching amendments at the hearing in the appellate court. The right to grant amendments at the hearing in the court where the cause is first heard, is for obvious reasons much broader than in the appellate court.

In the court of first resort it is generally more a question of terms than of power, if the amendment is germane to the controversy, and it is supposed it will help to a better or more complete result.—1 *Danl. Chy. P.*, 418; *Lord Darnley v. London, Chatham & Dover Rwy. Co.*, 1 *De G., J. & S.*, 204; *Walker v. Armstrong*, 8 *De G., M. & G.*, 531; 39 *E. L. & E.*, 450; *Hume v. Pocock*, *L. R.*, 1 *Eq. Cases*, 662. In that court the record is made up for the

SLATER v. BREESE.

appellate tribunal, and the latter, not having original jurisdiction, will be cautious about allowing changes in the record.

Questions of consequence may arise touching the terms allowed or refused below, but these are quite distinct from questions concerning the power to permit the amendment at all.

Here the amendments were plainly of such nature as to be within the competency of the court.

Before they were made, the defense assumed the relevancy of the matter they introduced. It must be taken to have drawn into question the Smith and Bemenderfer mortgages. The original answer stated that mortgages other than the Ashley and Sweet mortgages existed on the property to a "considerable amount," and it based claims upon that fact, and it must be assumed that the Smith and Bemenderfer mortgages were intended; since there is no hint of any others.

There is no basis for the objection urged.

It is not necessary to inquire what effect upon the right to make this objection might be regularly and justly ascribed to the fact of Breese's making answer to the amendments under the order which allowed them.

It is next urged that Breese's affidavit entitled him to sixty days' further time to make proofs.

It is a sufficient answer to this to say that the affidavit made no case for further time. It conveyed no information to the court as to what facts were expected to be proved by Rogers. This should have been done to enable the court to determine upon the relevancy and importance of the expected proofs.—*Thayer v. Swift, Walk. Ch.*, 384; *Meach v. Chappell*, 8 Paige, 135; *Sea Ins. Co. v. Stebbins, Id.*, 565.

The permission to defendant to take further proof in open court at the hearing could authorize no complaint on his part. It was a provision in the special order for his benefit. He made no showing for time to take proofs out of court.

SLATER v. BREESE.

I will now advert to the equities between these parties in respect to the mode of subjecting the premises pledged for payment of the mortgage in suit.

By his answer, Breese first insists that his portion should be sold first. Further on, however, he contends that the grist-mill property ought to be sold before his portion. He acquired his interest with notice of the preëxisting incumbrances complainant holds. He has no lien on the grist-mill property. His right is subsequent in time to complainant's right under the mortgage in suit, and also to complainant's right under the mortgages of Smith and Bemenderfer on the grist-mill property. Complainant is entitled, in any event, if necessary, to have recourse to the whole property it encumbers, for the purpose of making the amount of the mortgage in suit. The original answer, and the amendments to it, and the offer of proof by defendant, admit in effect, and almost in terms, that the Smith and Bemenderfer mortgages are actual existing incumbrances for some amount, more or less, on the grist-mill property, and the case contains nothing to the contrary.

The claim that an undivided half of the grist-mill property and the piece between became expressly charged with the Ashley mortgage under subsequent conveyances, in such manner as to warrant defendant in insisting that complainant should be required to sell and exhaust that interest first, is not sustained. It appears that the deed of Spaulding to Sarah Smith of January, 1870, stated that the grant was subject to that mortgage; and that the deed from Sarah Smith and Myron Smith to Joseph Rogers and Joseph Bemenderfer of October, 1870, stated that the grant was subject, not only to the same mortgage, but also to complainant's second mortgage. The language neither expressed nor implied any assumption by the grantees of the payment of the mortgage in suit, or any intention that the particular interest granted should be considered as charged thereafter with the whole amount of the old mortgage, in preference to the other property, and there was

SLATER V. BREESE.

nothing in the situation of Spaulding or Mrs. Smith to influence them to desire any thing of that kind. They were not original mortgagors, but intermediate holders of a portion of the mortgaged premises, and were never liable except in respect to the land. The only reasonable supposition is, that the real purpose of the statement in the deeds was to except the named incumbrances from the covenants.

The defendant now repudiates the first position in his answer, that the property ought to be sold in the inverse order of the incumbering, and insists upon his second position. That rests entirely on the maxim of equity that where one has a lien on two funds and another a later lien on one of them, the former is bound to exhaust the singly charged fund before resorting to that which is doubly charged. The maxim is grounded in natural justice, and contemplates that so long as the prior right is in no manner prejudiced, it should be exercised in the way most advantageous for later rights, and if the conditions supposed by it exist, it works beneficially for junior interests and without detriment to others. But before attempting to apply it, it is necessary to see whether the required conditions are found. If they are not, a resort to the principle will lead to results absurd and inequitable. How is it here? The argument for Breese assumes that the premises in which he is interested are bound first by the mortgage in suit and secondly by the Sweet mortgage, under which he claims, and hence are doubly charged, and that the grist-mill property is only burdened by the mortgage in suit, and therefore ought to be first sold. This assumption is plainly contrary to the fact. The grist-mill property, as well as that claimed by Breese, is burdened by a second charge, and not only so, but the second charge on this property is earlier than Breese's. We have nothing in the situation of the grist-mill property to correspond with the singly charged fund. The state of facts is not appropriate to the doctrine. There is no ground to call forth the equity. The argument

SLATER v. BREESE.

on the part of Breese is, in effect, that his interest being the latest should be preferred and saved to him by compelling complainant to procure satisfaction of his first and dominant security by the sacrifice of his second and intervening security. The bare statement of the proposition exposes its unsoundness. The grist-mill property is subject equally with that claimed by Breese to a double charge; and as the second charge upon it is prior to Breese's, it has an equitable preference to which his holding is subject. And the fact that such second charge belongs to complainant cannot stifle the equity or repel the principle. It is as much entitled to attention and regard when Breese insists upon its sacrifice to exempt his later interest in the other property, as though it belonged to a third party.

Breese's claim was therefore not warranted, and considering the priorities and the other facts, he was not entitled to object against the sale of his property before that of the grist-mill property.

The ruling of this court touching the "Woodward avenue lot" in *Cooper v. Bigly*, 13 Mich., 463, is a distinct authority to that effect. See also *Hastings Case*, 10 Watts, 303; *Averall v. Wade, Lloyd & G.*, 252; *Wise v. Shepherd*, 13 Ill., 41.

But the decree did not require his property to be first sold. It was shaped more advantageously for him. It provided that the grist-mill property, the saw-mill property, and the lot between, should be sold before his, and merely qualified this concession by directing that the sale should be subject to complainant's rights under the Smith and Bemenderfer mortgages and under his purchase on the statutory foreclosures.

As the position which Breese occupied did not allow him to claim the preference thus given to him in the order of sale, and it was a concession beyond his equities, and as he was not entitled to insist upon any order or mode of sale for his own benefit which would prejudice complainant's rights

SLATER v. BREESE.

under the Smith and Bemenderfer mortgages, he has no just ground for complaining against the order allowing the grist-mill property to be sold before his, that it provided that such sale should not impair complainant's rights.

The refusal of Breese's offer of proof was not error. He was not entitled to insist upon giving evidence that complainant's incumbrance under the Smith and Bemenderfer mortgages was less or more than had been claimed. That it was something, was, as before stated, substantially admitted; and being something, Breese, as holder of the later incumbrance on property equitably subject to be first consumed, and without interest in or lien upon the grist-mill property, was in no situation to insist on making proof to show how much of the grist-mill property would be required to satisfy the Smith and Bemenderfer mortgages. And at the same time, as before stated, complainant was equitably entitled to claim that his rights and interests under those mortgages, whether his interest was much or little, should be protected and not be sacrificed or prejudiced for the relief or ease of the later interest of Breese. The question of priority of sale, as between the grist-mill property and that of Breese, to satisfy the mortgage in suit, hinged entirely on the existence and not on the amount of the incumbrance on the grist-mill property under the Smith and Bemenderfer mortgages, and the fact that the court ordered that this last named property should be sold before that of Breese, and that complainant acquiesced, cannot be regarded as giving any ground to Breese to insist on further concessions.

A point is made in defendant's brief against allowing more than seven per cent. interest as against his premises. It appears to be without basis or aim. The amount due was found by a commissioner, to whom the case was referred therefor, and in decreeing the amount the court acted on the report, which the defendant seems to have acquiesced in. No exception or objection was taken to it on which to raise any question.—*Thorne v. Hilliker*, 12 Mich., 215; *Butter-*

SLATER v. BREESE.

field v. Beardsley, 28 Mich., 412, and cases. But this is not all. On comparing the decree with the report, it appears that no more than seven per cent. was allowed.

The decree below should be affirmed, with costs.

The other Justices concurred.

Waldo M. Johnson and another v. George F. De Witt and another.

Attachment: Application for dissolution: Right of possession. An application for the dissolution of an attachment should allege a right in the applicant to the possession of the property attached.

Application for dissolution of attachment: Right of possession: Executions. Where on the hearing upon an application to dissolve an attachment it appears that the applicants are not entitled to the possession of the goods attached, and that the same were held by officers of the law by virtue of executions against them, the application should be denied; the officers could not be deprived of their possession in this collateral way.

Heard January 11. Decided April 4.

Certiorari to Circuit Court Commissioner of Cass County.

Howell & Carr, for plaintiffs in *certiorari*.

A. J. & H. D. Smith, for defendants in *certiorari*.

MARSTON, J:

Plaintiffs in error, after commencing an action against defendants, caused an affidavit to be filed in which it was alleged that defendants had fraudulently contracted the debt for the recovery of which such suit had been commenced, and thereupon an attachment was issued and property of the defendants seized thereon. Defendants afterwards made an application to the circuit court commissioner for a dis-

JOHNSON v. DEWITT.

solution of the attachment. Their application sets forth that on the 4th day of November, 1876, a writ of attachment was sued out of the circuit court, and that "on the same day the following goods and chattels, at that time and now the property of these applicants, were attached and seized under and by virtue of such writ." A citation was issued, and on the return day thereof counsel for plaintiffs in error appeared and asked to have the proceedings dismissed for the reason that the application did not state that the defendants were entitled to the possession of the property. This motion was overruled, and evidence was introduced on the part of plaintiffs tending to show that the debt had been fraudulently contracted. They also introduced evidence, which was not disputed, showing that on the 26th day of October, 1876, these goods were seized by the United States marshal and the deputy sheriff by virtue of three executions, and that these officers still held possession of the goods by virtue of said executions. After the introduction of the evidence, plaintiffs' counsel again moved to dismiss the proceedings, on the ground that defendants were not entitled to the possession of the property. This motion was also denied.

As a general proposition, it may fairly be inferred that the owner of property is entitled to its possession, yet it by no means follows that the owner is in all cases entitled to possession. Third parties may, either by operation of law, or by the consent of the owner, have obtained the possession and right thereto, while the legal title and ownership is not changed. In such a case an application setting forth that the applicant was and is the owner would be strictly true, and yet, should all the facts be set forth in the application, it would clearly appear that the applicant would not be entitled to have the attachment dissolved and the property restored to him. It would seem, therefore, that the application should, on principle, allege a right to the possession of the property attached. We need not, however, dispose of this case upon the defective character of the

JOHNSON v. DEWITT.

application. It clearly appeared upon the hearing, and was not disputed, that the defendants were not entitled to the possession of the goods seized. The possession thereof was held by officers of the law under and by virtue of executions issued against the goods and chattels of these defendants. And the officers could not be deprived of their possession at the instance of the defendants in this proceeding. This case comes clearly within previous decisions of this court: *Osborne v. Robbins*, 10 Mich., 278; *Price v. Reed*, 20 Mich., 72; *Macumber v. Beam*, 22 Mich., 396.

The order of the commissioner must be reversed and held for naught, plaintiffs in error to recover costs.

The other Justices concurred.

Jehiel H. Montgomery v. Jane A. Merrill.

Amendments: Record: Extrinsic showing: Notice to adverse party. The power to amend is a highly valuable one, and ought not to be limited beyond what is necessary to keep it within safe bounds; and where the record itself furnishes the data for the required amendment, great liberality should be allowed; but where the amendment is to be made on an extrinsic showing, all practical precautions should be observed that no one be wronged by the action taken; and there ought always in such case, where practicable, to be notice to the party adversely interested, and especially where the proceedings are ancient.

Amendments: Party adversely interested: Notice. Where an amendment is sought to the proof of service of process, in order to make the record show jurisdiction of the defendant, so as to give validity and force to the judgment rendered in the cause, for the purpose of making use of the same in another suit, to sustain rights claimed to have been derived under the judgment, the party adversely interested in such latter suit is entitled to notice.

Amendments: Intervening rights of third parties. In general such amendments are not suffered to affect rights which third parties may have acquired while the proceedings remained defective.

Defective proceedings: Application to amend: Long delay: Excuse. An application for leave to amend, which is not made until seventeen years after the defective proceedings were had, comes too late; and the fact that the defect was not discovered until after the lapse of a considerable portion of this delay, does not help the matter where there has been a further delay after such discovery of three years and more, which is

MONTGOMERY v. MERRILL.

only excused by a showing that the circuit judge had been of counsel in the case and was incompetent to hear an application. The utmost promptness is required when application is to be made to correct errors in the record.

Judgment: Record: Jurisdictional defects: Parol evidence. Where the record of the judgment in another cause is introduced in evidence in a cause, parol evidence is not admissible to supply jurisdictional defects. The record must be complete in itself.

Heard January 12 and 16. Decided April 4.

Error to Calhoun Circuit.

Woodruff & Clapp, F. A. Stace and D. D. Hughes, for plaintiff in error.

The proof of service was amendable after judgment by showing the necessary facts, even without notice: *Crawford v. Howard*, 30 Me., 423; *State v. Clark*, 18 Mo., 432; *Blaisdell v. Steamboat*, 19 Mo., 157; *Kücher v. Reitsky*, 42 Mo., 427; *Webster v. Blount*, 39 Ill., 590; *Whittier v. Vaughn*, 27 Me., 301; *Foster v. Woodfin*, 65 N. C., 29; *Mayo v. Whitston*, 2 Jones (N. C.), 231; *Jackson v. O. & M. R. R. Co.*, 15 Ind., 192; *Jones v. Lewis*, 8 Ind., 70; *Montgomery v. Brown*, 7 Ill., 581; *Hall v. Williams*, 10 Me., 278; *Close v. Gillespie*, 3 Johns., 526; *Kirkwood v. Reidy*, 10 Kan., 453; *Chichester v. Cande*, 3 Cow., 39, and note; *Branker v. Molyneaux*, 4 M. & G., 226.

The order to amend is valid, though irregular, till set aside: *Fassett v. Talmadge*, 15 Abb., 205; *Morrison v. Austin*, 14 Wis., 556; *Thompson v. Kimball*, 46 Ga., 528; *De Armond v. Adams*, 25 Ind., 450; *Harrington v. Wofford*, 36 Miss., 31; *Hamilton v. Selz*, 25 Penn. St., 226.

And even if notice in such case was requisite and omitted, the court will not disturb the order if it was one that should have been made: *Wooster v. Glover*, 37 Conn., 315; *Thompson v. Kimball*, *supra*; *Allen v. Bideau*, 35 Ia., —; *Miller v. Perry*, 38 Ia., 301; *Sweeney v. Gulick*, 67 Ill., 208; *Berry v. Love*, 1 Wood., 120; *Hall v. Williams*, 10 Me., 278.

It was competent to move to amend and perfect the proof on trial: *Williamson v. Kincaid*, 4 Dall., 20; *Course v. Stead*, Id., 22; *U. S. v. Brig "Union"*, 4 Cranch, 216; *Arnold v. Nye*, 23 Mich., 286; *Mayo v. Whitston*, *supra*. It was competent to prove by affidavit the service, and the fact of the cessation of the bank's continued organization, and that Sidney Ketchum was its last president: *Young v. Thompson*, 14 Ill., 369; *Harrington v. People*, 6 Barb., 607; *Foreman v. Carter*, 9 Kan., 674. It was competent to prove the jurisdictional facts *in voce* on the trial: *Van Deusen v. Sweet*, 57 N. Y., 379; *Frink v. Frink*, 43 N. H., 508; *Weed v. Weed*, 25 Conn., —; *Talman v. Ely*, 6 Wis., 244; *Thompson v. Blackhurst*, 29 C. L., 313; *Farm-*

MONTGOMERY v. MERRILL.

ington v. Sommersworth, 44 N. H., 589; *Jenks v. Stebbins*, 11 Johns., 224; *Jolly v. Tolz*, 34 Cal., 321; *Freeman on Judgments*, 518. See also *Burrows v. Bailey*, 34 Mich., 64.

A court of general jurisdiction, when acting under a special statutory one, not according to the course of the common law, and when no statutory provision exists for showing the facts upon the record, is regarded as a court of limited jurisdiction, and its jurisdiction may be shown upon the trial like any other fact: *Foot v. Stevens*, *supra*; 1 *Smith's L. Cases*, 876; *Thompson v. Blackhurst*, 1 M. & N., 266; *Arnold v. Nye*, *supra*; *Noyes v. Butler*, 6 Barb., 613; *Van Deusen v. Sweet*, *supra*. Neither is it an available objection in this case that an amendment or proof *aliunde* was not offered in a previous stage of the case. There is no showing of any intervening rights since the judgment in 1858; and if there were, the return as it stood before amendment was notice to put one about to purchase upon inquiry.

If the defendant, by consequence of the denial of the amendment of proof of jurisdiction *aliunde*, would come in by prescription, as is asserted, but not admitted, then the amendment and the proofs should be allowed for that reason: *Horton v. Inhab. of Stamford*, 1 C. & M., 773; 1 M. & W., 316; *Dartnall v. Howard*, 2 Chitty, 28.

C. I. Walker, for defendant in error.

The power of amendment in a court of record is very broad, for the purpose of promoting justice, and it may be exercised after the lapse of many years: *Herman on Ex.*, 397-9; *Avery v. Brown*, 39 N. H., 393. It has, however, been held that after the lapse of six years it was a proper exercise of the discretion of the court to refuse such amendment, even as between the parties: *Thatcher v. Miller*, 11 Mass., 413; *Thatcher v. Miller*, 13 Mass., 269.

There are many obvious limitations to the power of courts thus to alter their solemn records. One is, that it may not be done without notice to the other party to the record: *Freeman on Judgments*, § 72; *Hermann on Ex.*, p. 398; *Whitwell v. Emery*, 3 Mich., 89; *Emery v. Whitwell*, 6 Mich., 488, 492; *Dennison v. Smith*, S. C., January Term, 1876, *Michigan Lawyer*, No. 2, p. 13; *Dorsey v. Pierce*, 6 Miss., 173; *Means v. Means*, 42 Ill., 50; *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Wilkie v. Hall*, 15 Conn., 32; *Green v. State*, 19 Ark., 637; *Martin v. Burt*, 20 Ark., 636.

Nor even then will it be done in a case like this, where the service was not personal, but constructive and statutory, unless the record at the time shows a compliance with the statute,

MONTGOMERY v. MERRILL.

the court acquires no jurisdiction: *Greenvault v. F. & M. Bank*, 2 Doug., 508; *Wilson v. Arnold*, 5 Mich., 105; *Lot Two v. Sweetland*, 4 Green, Iowa, 466; *Tunis v. Whitman*, 10 Iowa, 305; *Hodson v. Tibbitts*, 16 Iowa, 97; *Brau v. Arrington*, 22 Ark., 362.

Nor when the original defendant is dead, or has ceased to have an interest in the matter, as in case of bankruptcy: *Phillips v. Tannin*, 6 Bing., 237; *Hunt v. Pasmore*, 4 M. & S., 329; 6 N. H., 460.

Nor can an amendment be made to affect the rights of third parties: *Freeman on Judgments*, § 74; *Hermann on Ex.*, p. 56; *Inman v. Hurst*, 2 New. R., 133; *Greenvault v. F. & M. Bank*, 2 Doug., 514; *Emerson v. Upton*, 9 Pickering, 167; *Hovie v. Waite*, 17 Pickering, 199; *Howard v. Turner*, 6 Greenleaf, 106; *Means v. Osgood*, 7 Greenleaf, 148; *Bannister v. Higgins*, 16 Maine, 73; *Pierce v. Strickland*, 25 Maine, 289; *Ohto L. & T. R. Co. v. Urban Ins. Co.*, 13 Ohto, 221; *McCormack v. Mellish*, 36 Ill., 114; *Thompson v. Kimbry*, 46 Ga., 534; *Dawson v. Cowan*, Dev., 304; *Cape Fear Bank v. Wilson*, 2 Iredell, 148; *Williams v. Sharp*, 70 N. C., 584; 4 N. H., 116; 39 N. H., 377; 7 Ill., 164.

We insist, therefore, that the record, as thus amended, was rightly rejected, for the reasons suggested: (1) This is not one of the cases where an amendment essential to showing jurisdiction can be made, the service upon the defendant being statutory, not actual; (2) The defendant has ceased to exist, and no amendment can therefore be made; (3) The amendment was made without notice, which is never admissible; (4) It was made at too late a period; (5) The amendment affects the rights of defendant, who is no party to the record.

The court having rejected the amended record as evidence in the plaintiff's title, the plaintiff then offered to prove a proper service upon the bank by a service upon its last president, in three several ways: *first*, by affidavits taken in the case of *Montgomery v. The Bank*, already filed in that case, and upon which the motion to amend was based; *second*, by new affidavits made by the same parties to the same effect; *third*, by the oral evidence of Judge Woodruff, who made the original service, that said Ketchum was the president of the bank.

We think it clear beyond all question that the validity of this judgment must rest upon the record; that it cannot be helped out by parol testimony, or by any testimony save that of the record itself. The record can neither be contradicted nor in any way affected by parol evidence: *Herman on Ex.*, p. 391; *Allan v. Carpenter*, 15 Mich., 33; *Gardener v. Hosmer*, 6 Mass., 328; *Wellington v. Gale*, 13 Mass., 483, 487; *Bannister v. Higgins*, 16 Maine, 73; *Metcalf v. Gillett*, 5 Conn., 400; *Sheldon v. Comstock*, 3 R. I., 84; *Sullivan v. Blackwell*, 28 Miss., 637; 6 Barb., 607.

MONTGOMERY v. MERRILL.

COOLEY, CH. J:

This case has twice before been in this court: *Montgomery v. Merrill*, 18 Mich., 338; *Merrill v. Montgomery*, 25 Mich., 73. It is an action of ejectment brought for lands which the plaintiff claims under an execution sale on a judgment against the Calhoun County Bank. The defendant is in possession, and though the nature of her claim is not disclosed by this record, it appeared when the case was before us in the first instance that she claimed under proceedings against the bank ante-dating the plaintiff's judgment. The only questions which the present record brings up are: *First*, The validity of an amendment made to the record of plaintiff's judgment in order to show that the court had jurisdiction to render it; and *second*, whether, if the amendment was not admissible, the facts upon which it was made could be shown on the trial in order to sustain the jurisdiction of the court which rendered the judgment.

The charter of the Calhoun County Bank expired in 1857, but by statute the bank was continued in existence for three years longer for the purpose of winding up its concerns. The suit in which the plaintiff obtained his judgment was commenced in 1858, after the bank had ceased to do business. Service of the declaration was made upon persons who, the attorney showed by affidavit, he was informed and believed were the last president and two of the last directors of the bank. This showing was held insufficient to warrant such service; a positive showing of facts being requisite when an exceptional service is to be made.—*Merrill v. Montgomery*, *supra*. After the decision to that effect had been made by this court, the plaintiff made an *ex parte* application in the court below for leave to amend by making the positive showing that should have been made in the first instance, and this was granted August 3, 1875. The showing consisted in affidavits that Sidney Ketchum, one of the parties upon whom service of the declaration was made, was the last president of the bank. That showing, if originally made, would have been sufficient to support the judgment.

MONTGOMERY v. MERRILL.

When the cause went to trial again, this amended record was offered in evidence, objected to and rejected on the ground that the amendment was unwarranted. The plaintiff then offered to show, by affidavits and parol evidence, that Ketchum was in fact the last president of the bank, and he claimed that such a showing would sustain the service on Ketchum and support the action of the court in rendering judgment upon it. This offer was rejected, and the plaintiff being then unable to support his title, judgment passed against him.

Counsel for the plaintiff have been very diligent in collecting cases to show how liberal have been the rulings of the courts in permitting amendments in support of their proceedings and in furtherance of justice. The power to amend is a highly valuable one, and we should not willingly see it limited beyond what is necessary to keep it within safe bounds. So many errors occur through inadvertence or the carelessness of officers that some power of correction is absolutely essential, and the errors occur under such a variety of circumstances and differ so greatly in the manner in which they affect interests when discovered, that it is not safe to lay down any very strict rules regarding the time and the manner of permitting amendments.

Where the record itself furnishes the data for the required amendment, great liberality should be allowed, because the danger of injustice in permitting amendments is very slight.—*Emery v. Whitwell*, 6 Mich., 474. But where the amendment is to be made on an extrinsic showing, all practicable precautions should be taken that no one be wronged by the action of the court; and as most facts are susceptible of contradiction, there ought always when practicable to be notice to the party adversely interested, in order that he may have the opportunity to make a counter showing. And the more ancient are the proceedings, the greater is the importance of giving this notice, because the danger of a false showing increases as the distance in time from the facts increases.

In *Denison v. Smith*, 33 Mich., 155, it was decided

MONTGOMERY v. MERRILL.

that a party who would be affected by an amendment of proof of service could not be bound by one which was made *ex parte*. The right to notice in such cases is affirmed by *Mr. Freeman* in his treatise on *Judgments*, § 72, who cites cases in its support. It is also recognized tacitly by the great majority of all the cases cited by the plaintiff's counsel on the argument, for the amendments sanctioned by them were made on notice and after a hearing. We refer to the following as cases which either expressly affirm the right or tacitly recognize it.—*Chichester v. Cande*, 3 Cow., 39; *Hamilton v. Seitz*, 25 Penn. St., 226; *Wilkie v. Hall*, 15 Conn., 32; *Weed v. Weed*, 25 Conn., 337; *Farmington v. Somersworth*, 44 N. H., 589; *Den v. Fen*, 12 N. J., 321; *Hill v. Hoover*, 5 Wis., 386; *Gillett v. Robbins*, 12 Wis., 319; *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Blaisdell v. Steamboat*, 19 Mo., 157; *Webster v. Blount*, 39 Mo., 500; *Jackson v. O. & M. R. R. Co.*, 15 Ind., 192; *Young v. Thompson*, 14 Ill., 380; *Means v. Means*, 42 Ill., 50; *Dorsey v. Pierce*, 6 Miss., 173; *Alexander v. Stewart*, 23 Ark., 18. The requirement of notice is only a matter of common right in such cases, for the party is condemned unheard if an amendment is allowed which gives to the proceedings an effect adverse to his interests which they did not have before, without his being allowed the opportunity to dispute and disprove the grounds of the action. In a few cases amendments made on an *ex parte* showing have been supported, but we cannot regard them as consistent with principle.

But it is said that the bank having gone out of existence, there was no one upon whom notice could be served. Whatever force there might be in this excuse in some cases, it could have none under the facts of this case. The amendment was desired for the purpose of controlling this very case, and this defendant was the party to be affected by it. She was the party, and so far as we know the sole party interested adversely to the amendment, and as this was perfectly well known to the plaintiff, the duty to give notice was apparent. This seems to us a fatal defect; we cannot

MONTGOMERY V. MERRILL.

assume that the defendant, if allowed the opportunity, might not have disproved the showing which was made. At any rate she should have been allowed the opportunity. In general such amendments are not suffered to affect rights which third parties may have acquired while the proceedings remained defective,—*Freeman on Judgments*, § 74; *Herman on Executions*, 56; but if the defendant's rights, such as they are, accrued previous to the judgment, probably she would not be within the protection of this principle. Her right to notice, however, is at least as good as would have been the right of the bank if still in existence.

Another objection seems to us fatal. The application for leave to amend was not made until seventeen years after the service had been made. If it be urged that the delay in the application was because the defect was not discovered until the case was last in this court, the case is helped but little, for even then there was a delay of three years, which is only excused by showing that the circuit judge had been of counsel in the case and was incompetent to hear an application. But with other circuit judges within easy reach at any time we cannot attach much importance to this fact. The matter had been delayed longer than is now necessary under our laws to bar a right of entry; and it is the party's misfortune if he has lost rights in consequence. The utmost promptness is required when application is to be made to correct errors in the record.—*Rogers v. Rogers*, 1 Paige, 188.

We think also that the court was right in rejecting the evidence offered by the plaintiff on the trial to show that Sidney Ketchum was in fact the last president of the bank. Jurisdictional facts cannot rest in parol, to be proved in one case and disproved, perhaps, in another. The record must be complete in itself.

The judgment must be affirmed, with costs.

CAMPBELL and MARSTON, JJ., concurred.

GRAVES, J., did not sit in this case.

HARLOW v. LAKE SUPERIOR IRON CO.

Amos R. Harlow v. The Lake Superior Iron Company.

Landlord and tenant: Mines. A lessee of lands for years is entitled to work an open mine upon the premises, unless restricted by the terms of his lease; but he has no right to open a new mine, unless this privilege be expressly granted.

Lease: Construction: Intention: Entire instrument. In construing a written lease, it is contrary to well settled rules of construction to give it a narrow and technical interpretation based upon some particular word or clause; the intent must be gathered from an examination of the instrument as a whole, and such a construction must be put upon it, if possible, as will render all its clauses consistent and harmonious.

Mining privilege: Particular use: Possession: Lease. The lease in question in this cause is construed to be, not a lease of the lands, with the privilege of mining thereon, or together with the ore and minerals to be found upon the same, but a grant of a specific mining privilege, particularly set forth in the lease, in such manner as to exclude all other uses to which the lessee might otherwise have been entitled to put the premises; and to confer no right to the use or possession of the lands for any purpose whatever except as an incident to the mining right granted and in connection with the exercise of that right.

Lease: Use of premises for agricultural purposes: Right of possession. The provision in the lease, reserving to the lessor the use for agricultural purposes of all the premises not needed for mining purposes, is inconsistent with an intent to grant an ordinary leasehold interest.

Lease: Mining right: Incorporeal interest: Possession: Ejectment. Under a lease granting an undivided interest or right to enter upon the premises and open and work such mines as the lessee might deem proper, with the further right to appropriate to his sole use and benefit all ores and minerals procured by him, and the right to obtain wood for the purposes aforesaid, to erect and maintain buildings suitable and needful for the business, the right of the lessee in the premises, until actual possession of some part thereof has been taken, is floating and indefinite, a mere incorporeal right, which is not capable of enforcement by an action of ejectment.

Lease: Construction: Agreement to sell to lessee, etc. The provisions in the lease whereby the lessor agrees not to sell, assign or encumber the undivided interest leased without giving the lessee or his assigns the first refusal to purchase the same, and in case of division to give the lessee, his heirs or assigns the first refusal to purchase the divided half, and gives the lessee the right to have the land divided, are held not inconsistent with the construction put upon the lease by the court.

Mining right: Undivided half: Assignment: Indivisible interest. The right leased, being that of an undivided half, gave the lessee the right to prospect over the entire lands and open and work as many mines as he deemed proper; and this right he could undoubtedly assign or convey to a copartnership or corporation; but he could not carve it up and parcel it out into several distinct rights, to be held and operated by more than one person, company or corporation; his right, being a single one,

HARLOW V. LAKE SUPERIOR IRON CO.

could not be subdivided; and a similar undivided right remained vested in the lessor.

Heard January 18. Decided April 4.

Error to Marquette Circuit.

F. O. Clark, Bull & Owen, Daniel Goodwin and John Van Arman, for plaintiff in error.

The lease, although containing several provisions of a very unusual character, was intended to and does convey the undivided one-half of the land itself, and not a mere mining right.

The demise is of the undivided half of a quarter section of land, and the language in which it is expressed is entirely unequivocal, and the subsequent provision, by which the lessor binds himself not to sell or encumber the interest thereby leased until the lessee had first been allowed the privilege of purchasing "said undivided one-half," and granting the lessee the right at any time during the lease to have said land divided, or purchase the same undivided, and also providing that in case the parties, lessor and lessee, should be unable to agree upon the manner of such division of said land, or the terms of such purchase, that appraisers should be mutually chosen to decide in relation to such division or purchase, or both, are conclusive evidence of the intention and understanding of the parties. As between the lessor and lessee of the undivided one-half of the land, these provisions are reasonable and practicable, but not one of them, except possibly that whereby the lessor binds himself not to sell or encumber the interest leased unless the lessee is first allowed the privilege of purchasing said undivided one-half, is either sensible or even practicable when applied to the lease of a mere mining right. And even this provision, giving the lessee the presumption or first right to purchase the undivided one-half of the land, although not necessarily inconsistent with the demise of the mere mining right, is expressed in language which strongly indicates the understanding and intention of the lessor to convey the undivided one-half of the land by this lease.

The lease not only contains the usual language employed in a lease of the land, but also a provision, expressed in clear and unequivocal language, giving to the lessee the right at any time during the term of the lease to have a division of the quarter-section of the land itself between the lessor and lessee; and to render the right thus conferred on the lessee available

HARLOW v. LAKE SUPERIOR IRON CO.

without expense or delay, a mode of making such partition without resort to legal proceedings is carefully provided. Now as between a lessor and lessee of the undivided one-half of the land, such a provision is practicable; but as between two persons, one of whom is the owner of the land, and the other of whom has no estate or interest therein, this provision is utterly impracticable; for in such case there could be no division consistent with or corresponding to the rights of the parties. Even if one of the parties were possessed of a mining right, such as that conveyed by this lease, but no interest in or share of the land, no such partition as is here provided for would be practicable consistently with the respective rights of the parties; for it is a partition of the land (said quarter-section) which is expressly provided for, and therefore, even if the mining right described in the lease were capable of division, no such division is authorized or referred to in the lease.

It is impossible to construe this lease as the lease of an easement only, and not a demise of the land. From a careful examination of its different provisions, it is the manifest intention of the parties to create a tenancy in common between the lessor and lessee in the land, and then regulate the rights of each of said tenants in relation to the use which each shall enjoy thereof during such tenancy in common. And the provisions of the lease in relation to the separate use of the land, are not inconsistent with the joint ownership or tenancy in common.

The statement of the purpose of the lease does not prevent the land from passing thereby.—2 Washb. on R. P. (4th ed.), 300; *Chatham v. Brainard*, 11 Conn., 90; *Coburn v. Cozeter*, 51 N. H., 166; *Scullin v. Brown*, 4 B. & C., 485; *Coke Litt.*, 4 b.; *Stuyvesant v. Mayor, etc.*, 11 Paige, 414; *Cassellon v. Langdon*, 11 Vt., 217; *De Forest v. Brown*, 1 Hilton, 43.

In construing a contract it is proper and often necessary, not only to consider the various provisions and stipulations of the contract itself, but also the situation of the subject matter of the contract and the interests of the parties therein.—*Wilson v. Troup*, 2 Cow., 195; *Sumner v. Wilson*, 8 Mass., 214; *Fowler v. Bigelow*, 10 Mass., 379; *Hopkins v. Young*, 11 Mass. 302; *Howland v. Leach*, 11 Pick., 134; *Hollingsworth v. Fry*, 4 Dall., 345; *Shultz v. Johnson*, 5 B. Mon., 497.

The main and controlling principle adopted by courts in the construction of written contracts, whether under seal or resting in parol, is to so read and construe them as to carry into effect the actual purpose and intention of the parties; indeed, the intention of the parties, as indicated by the

HARLOW V. LAKE SUPERIOR IRON CO.

terms and provisions of the contract, and as derived from a careful consideration of all parts thereof, in contemplation of law constitutes the contract.—*Knowles v. Emerson*, 9 *Pick.*, 422; *Wheelock v. Turner*, 19 *Pick.*, 167; *Haywood v. Perrin*, 10 *Pick.*, 230. The first and paramount rule of construction of contracts is to make them speak the intention of the parties as gathered from the contract and the entire transaction. Other rules are subservient to this, and whenever they contravene it, are to be disregarded.—*Gray v. Clark*, 11 *Vi.*, 583; *Kelley v. Mills*, 8 *Ham.*, 525; *Patrick v. Grant*, 2 *Shep.*, 233.

The reservation in said lease for agricultural purposes is a reservation in the proper and technical sense, and therefore remains inoperative until possession taken by the lessor under it, or if considered as an exception from the thing demised, it is void for uncertainty.—*Shep. Touchstone*, 78; *Doe v. Lock*, 4 *N. & M.*, 807; 4 *Kent Com.* (10th ed.), 568, (12th ed.), 468.

For the distinction between exception and reservation, see *Thompson v. Gregory*, 4 *Johns.*, 81; *Provost v. Calders*, 2 *Wend.*, 517; *Dygeri v. Mathews*, 11 *Wend.*, 35; *Stoll v. Wilson*, 42 *Me.*, 21; *Coke Litt.*, 47a; *Craig v. Wells*, 11 *N. Y.*, 321; *Ives v. Van Aiken*, 34 *Barb.*, 566.

W. P. Healy, G. V. N. Lothrop, C. I. Walker, and J. J. Storrow, for defendant in error.

These things are, we believe, perfectly distinguished in law: (1) Ownership of, and full dominion over the land, *ab inferis, usque ad coelum*, either in fee or for years: 2 *Black. Com.*, 18; (2) Ownership of the stratum of minerals below the surface of the land, as distinguished from the ownership of the whole land: *Bainbridge*, 4, 5, 33, 36; *Wilkinson v. Proud*, 11 *M. & W.*, 39; *Caldwell v. Fulton*, 31 *Penn. St.*, 475; (3) Ownership of a mine already opened and existing in the land of another: *Bainbridge*, 33, 130, 497-8-9; (4) A mere right to enter, search for, dig and raise minerals, and thus acquire the ownership of the minerals so dug and raised: *Bainbridge*, 117, 261, and cases hereinafter cited.

The first imports exclusive possession and enjoyment of the whole; the second imports like possession and enjoyment of a defined stratum of the whole, beneath the surface; the third imports like possession and enjoyment of that portion of surface and substratum actually included within the mine and its works. All these are rights in land, which can be properly described, both in extent and estate, and will sustain eject-

HARLOW v. LAKE SUPERIOR IRON CO.

ment; each implies present ownership and possession of a physical thing, which one may hold alone, in common, in fee, or for years. But the *fourth* is a mere right. The grant of it does not describe any thing in or on the land which a surveyor or sheriff can find, or take, or give possession of. In the grant the right is floating. But when the grantee, in the exercise of his right, finds, digs and raises minerals, they thereby become appropriated in ownership. They become his own chattels. In law his right by the grant is an incorporeal hereditament. By the exercise of it he severs minerals from the land and makes them his own. But the mere right is one for which ejectment does not lie.—*Tyler 37, 41; Rowan v. Kelsey, 18 Barb., 484; Child v. Chapel, 9 N. Y., 246.*

But the grantee in the exercise of this right may, and usually must, establish and open a mine. This fixes an absolute possession, the enjoyment of which is necessarily exclusive. When possession is thus annexed to his right, he has an interest which may be vindicated by ejectment, until he abandons such possession. His occupation, united with his right, defines and bounds an interest in land which the sheriff can take and give possession of.

This right, with respect to a particular tract of land, may be granted and enjoyed (besides those divisions which depend on length of time) in two ways: (1) It may be held by two as tenants in common; in which case each is entitled to an equal and common enjoyment of the mine and its works, and of the minerals raised; and each is liable to account to the other for the profits of the mine; (2) Or the grant may be to A, not exclusive, and of a similar right to B; in which case each, at his own cost and risk, and in his own way, may open and work a mine, having exclusive possession and owning exclusively what he raises; or the grantor may grant a right to A, not exclusive, retaining a similar right to himself.

In the first case, that of a grant to two in common, their rights, *inter sese*, are determined by the principles which govern the relations of tenants in common. In the second case the parties are governed by those rules which apply to rights independent in law, and possibly conflicting in exercise. It then falls to the courts so to restrain and regulate the exercise of these rights, that while each shall have a substantial and profitable enjoyment for himself, neither shall unjustly impair the proper enjoyment of the other.

These doctrines are fully considered and established in the following cases: *Washburn on Easements, p. 14; Beatty v. Gregory, 17 Iowa, 116, Dillon, J.; Bainbridge on Mines, 494 (302*

HARLOW v. LAKE SUPERIOR IRON CO.

of Eng. ed.); *Doe v. Wood*, 2 B. & Ald., 724; *Wilkinson v. Proud*, 11 M. & W., 39; *Union Petr. Co. v. Bliven Petr. Co.*, 73 Penn., 181; *Funk v. Haldeman*, 53 Penn., 247; *Grubb v. Bayard*, 2 Wall. Jr., 81; *Karns v. Tanner*, 66 Penn., 307.

It is true that a grant of all the use or profit of a thing is sometimes held to be equivalent to a grant of the thing itself, but only when the grant is absolutely without limitation or stint, never where there is a limitation of time, nor where the grant is not exclusive of the grantor and all other persons: *Chetham v. Williamson*, 4 East, 469.

It is clear that the lease in question was neither of the second or third things above described; neither a grant of a stratum of minerals below the surface, nor of a mine existing.

It must therefore be either of the first or fourth class of our subdivision.

It is not of the first. If it were, it is clear that the only subdivision of cotemporaneous enjoyment would be that of tenants in common. This is what the plaintiff claims. And he admits that the defendant has a common right to the beneficial enjoyment of the premises with himself. It thus follows, in such case, that if one such tenant has gone to enormous expenses in sinking shafts, exploring and erecting works, the other may sit by and escape any share of the expense if the enterprise fails; while, if it is a success, he may come in and claim his share: *Carpenter v. Webster*, 27 Cal., 525; *Bennell v. Clemence*, 6 Allen, 10.

Such a result is so prejudicial to mining enterprise, that courts will not so construe grants, unless required so to do by the plain meaning of the words used. Instances are found where grants made when the subject was of small value, are construed one way or the other according to the bearing which such construction would have on a great industry of the state: *Ashley v. Peere*, 18 Pick., 276; *Tourtelotte v. Phelps*, 4 Gray, 374.

It is true that a portion of the words of this instrument are broad enough for an ordinary demise of an undivided half of the quarter section. But a writing is to receive its construction from a survey of the whole instrument, and not from any detached part of it. Especially is this true when the writing, as in this case, was evidently the work of unskilled persons. Here the general words first used are expressly limited in their operation by the residue of the same sentence; the only purpose of the grant being for the mining of iron ore and other minerals, and of such privileges as were essential to make such mining productive and profitable. This

HARLOW v. LAKE SUPERIOR IRON CO.

intent is made still more clear by the next clause giving to Graveraet the "right to appropriate for his *own sole use all ores and minerals procured from said lands during the term of said lease.*" This clause, while throwing the clearest light on the true meaning of the parties, at the same time strikingly shows their want of skill and precision in expression. In terms it gives to Graveraet sole right to *all* the ores and minerals mined on the lands during the whole term; while it is obvious that it must be limited to such as should be mined by or under himself.

And now the closing declaration made by the parties, in further explanation of their meaning, that the grant was not to extend to the surface of the land, except so far as was needed for mining purposes, and as it seems to us the demonstration is complete.

It is also worthy of notice that there is neither habendum nor re-entry clause in the instrument. This shows, as already said, that the writing lacks professional form and precision; and also that the grantor did not intend to part with the absolute possession as under an ordinary lease.

The provision for Briggs retaining the use of the land till sold, for agricultural purposes, saving what is needed for mining purposes, is not a "reservation." It does not by a reservation take back something previously granted. It is clearly a further declaration of the parties, used to make certain the meaning and effect of the previous words.

The right disclosed by the declaration is of a tenancy in common of a term of years, in the whole land. But this does not conform to the grant in any of its essentials. The primary intent of the grant, however construed, was for mining purposes on land as yet wholly unworked. Yet an ordinary tenant for years cannot open new mines: *Rogers on Mines*, 170, 266, 288.

And the right to do so is never an "appurtenance," but a substantial interest in itself; must be granted by appropriate words, and when the owner brings action respecting it, he must declare for it and prove it. Again, if recovery could be had under plaintiff's declaration, he would recover his aliquot share in the entire land and premises as it now stands; he must be put in possession jointly and in common with us of all our mines and works opened and built by us at such vast cost: *Carpenter v. Webster*, 27 Cal., 525; *Bennett v. Clemence*, 6 Allen, 10. Still more. He would be entitled to recover, as profits, one-quarter of all the ore raised by us during the period for which profits may be recovered.

HARLOW v. LAKE SUPERIOR IRON CO.

Now, as we have said, a construction which leads to such results will be adopted only when the terms of the writing are imperative. It will not be adopted when the whole object of the writing can be effected by a different construction, and at the same time great wrong and hardship to other parties avoided.

From what we have said we think it plainly appears that whatever may be the interest of plaintiff, it is not that of a tenant in common, as set up in his declaration.

We believe we have shown that this is neither a plenary grant of land, nor of a stratum of minerals below the surface of land, nor an existing mine. But there is another right respecting mineral lands which is clearly recognized and defined in law. And this grant, we insist, belongs to this last class of rights. It is defined as a right or license to enter on lands, search for, dig and take away minerals. As incident to this right the grantee may open mines, build mining works, and operate the same on the land. Until there is an actual location on the land, in the exercise of the right, it is merely a right incorporeal, and will not sustain an action of ejectment. After an actual location, the union of the right with a local possession gives a definite and tangible interest in the land itself, which may be vindicated by ejectment: *Bainbridge*, 261, 267, and 246, 498-9; *Tyler on Eject.*, 41-2; *Lord Mountjoy's Case*, 4 Leon., 147; *Chetham v. Williamson*, 4 East, 469; *Doe v. Wood*, 2 B. & Ald., 724; *Norway v. Rowe*, 19 Ves., 157; *Grubb v. Bayard*, 2 Wall. Jr., 81; *Clement v. Youngman*, 40 Penn., 341; *Brandt v. McIver*, 18 Penn., 70; *Caldwell v. Fulton*, 31 Penn., 476; *Funk v. Alderman*, 53 Penn., 229; *Union Petr. Co. v. Bliven Petr. Co.*, 72 Penn., 173; *Stockbridge Co. v. Hudson Co.*, 107 Mass., 322; *Beatty v. Gregory*, 17 Iowa, 116; *Jackson v. May*, 16 Johns., 184.

When the right has not become so fixed or localized on the land, redress for any injury in respect to the right is entirely different. Thus, if the right is denied, the proper redress is by action on the case, or by bill in equity. Now, this right to enter and search for minerals, to dig and carry away as his own sole property all he shall raise, is, we think, the precise right granted by Briggs to Graveraet. This view gives precisely what was sought to be secured by the writing, and it is the only construction which fits the entire writing, and which is consistent with the rights of all parties.

It may be proper again to observe here, what has already been noted, viz.: that the right here granted to take and appropriate minerals is not an "exclusive" one, as it is called in

HARLOW v. LAKE SUPERIOR IRON CO.

the books. That is, it does not preclude the grantor from exercising a like right, or granting to others a like right in said land. On this point see *Bainbridge*, 269, 270, and cases cited; *Chatham v. Williamson*, 4 East, 479; *Grubb v. Bayard*, 2 Wall. Jr., 97; *Carr v. Benson*, L. Rep., 3 Ch. App., 524; *Stockbridge Co. v. Hudson Co.*, 107 Mass., 322.

MARSTON, J:

Plaintiff in error, claiming to be owner of an undivided one-fourth leasehold interest, for ninety-nine years from and after Sept. 28, 1850, in the southwest quarter of section ten, township 47 north, of range 27 west, in 1875 brought an action of ejectment to recover possession thereof.

Upon the trial, to maintain the action, he introduced in evidence:

First, A certified transcript of articles of incorporation, dated February 21, 1853, whereby the defendant became a body corporate;

Second, Original articles of copartnership of the Marquette Iron Company;

Third, A copy of a patent, dated December 1, 1851, of the lands in question, from the United States to Isaiah Briggs.

He also introduced certified copies from the records of of the following instruments:

Fourth, A lease from Isaiah Briggs to Robt. J. Graveraet;

Fifth, An assignment of the same by Graveraet to the Marquette Iron Company; and,

Sixth, A deed from said Graveraet to Amos R. Harlow and Waterman A. Fisher, whereby said Graveraet did "recede and retire" from the partnership known as the Marquette Iron Company, and did thereby yield, quit-claim and forever release to said Fisher and Harlow all rights, claims and titles, legal or equitable, to the property and effects, both real and personal, of said company, excepting certain property not affecting the lands in question.

The plaintiff farther introduced evidence tending to prove

HARLOW v. LAKE SUPERIOR IRON CO.

that he took possession of the property in question in February, 1857, and erected a log house thereon, and remained in possession thereof about six weeks; that on returning to the premises in October following he found the defendant in possession, and that his right therein was disputed. It also appeared that Edward Clarke died in August, 1849. Having rested, the defendant's counsel moved the court to strike out and exclude from the evidence introduced:

First, The lease from Briggs to Graveraet;

Second, The assignment thereof to the Marquette Iron Company;

Third, The deed from Graveraet to Harlow and Fisher of the partnership assets of the Marquette Iron Company; because

First, They were not admissible under the declaration;

Second, The assignment was void and could vest no title in the Marquette Iron Company, said company being a copartnership and not a corporation; and

Third, If any interest was vested in the plaintiff it was as a partner; and it not appearing that the affairs of the partnership had been settled, plaintiff could not maintain ejectment thereon.

The motion was granted, and no other evidence having been introduced, the court directed the jury to return a verdict for the defendant, and to all of which, counsel for plaintiff excepted. A verdict and judgment having been rendered for the defendant, the plaintiff brings the case here for review upon writ of error.

The copartnership known as the Marquette Iron Company, when formed, was composed of Waterman A. Fisher, Edward Clarke, Amos R. Harlow and Robert J. Graveraet. Clarke died in 1849, and Graveraet withdrew therefrom in August, 1852. While it appears from the record that the Marquette Iron Company did carry on business for some time after its formation, it does not appear that any thing was done by it, under the Briggs lease, upon the lands in dispute. A number of questions growing out of the rela-

HARLOW V. LAKE SUPERIOR IRON CO.

tions of the plaintiff with the Marquette Iron Company, similar to those raised in the court below, were elaborately discussed upon the argument. We do not, however, deem it necessary to consider them, as the view we take of this case upon a construction of the lease, is, we think, decisive of the present action.

Conceding, for the purposes of the present case, that the plaintiff has shown in himself an undivided one-fourth interest under the lease, and his right to maintain an action of ejectment therefor, which, to say the least, is very doubtful, let us turn to that instrument and ascertain from it, examined as a whole and in the light of the circumstances existing and known to the parties at the time of its execution, what rights the lessee acquired thereunder. A copy of the lease is given in the margin. It is not claimed that the rights then granted have since, either by construction of the parties, possession of the premises thereunder, or otherwise, been enlarged, although the plaintiff's interest therein may have been increased by the death of Clarke and the deed from Graveraet.

"Know all men by these presents, that, whereas, I, Isaiah Briggs, of Marquette county, state of Michigan, have this day obtained a pre-emption to, and have paid the full consideration to the receiver of the land office at Sault Ste. Marie, for the quarter section of land lying in Marquette county and state of Michigan, known and described as the southwest quarter of section ten (10), in township forty-seven (47) north, of range twenty-seven (27) west, to which a full title will be perfected: Now, in consideration of five hundred dollars, to me paid by Robert J. Graveraet, of Marquette county and state aforesaid, receipt whereof is hereby confessed, I do hereby let and lease to said Robert J. Graveraet, his heirs or assigns, the equal undivided one-half part of said southwest quarter of said section ten (10), in said township and range, for the full end and term of ninety-nine years from and after the date of these presents, fully to be complete and ended, for all the purposes of mining of iron ore and other minerals, and for all the business of said mining, obtaining ore, roasting the same, obtaining wood for said purposes, erecting and maintaining buildings suitable and needed for said business and calling, and for all purposes of making the mining interest on said land productive and profitable, and granting to said party the right to appropriate to his own sole use and benefit all ores and minerals procured from said land during the term of said lease; and further, I hereby agree and bind myself not to sell, assign, or encumber said undivided interest hereby leased, unless said Graveraet, his heirs or assigns, shall have the first refusal to purchase said undivided one-half, or if said quarter section be divided,

HARLOW v. LAKE SUPERIOR IRON CO.

It is unnecessary to attempt to define or even to discuss in this case all the rights which a lessee of wild lands would have in this state. We may, however, for the purposes of this case, consider the law as settled, giving to a lessee of lands for years the right to work an open mine upon the premises, unless restricted by the terms of his lease; and it is also equally well settled that he would not have the right to open a new mine, unless the right so to do was expressly granted. Such, it is said, are the general rights of lessees of lands in which there are minerals.—1 Wash., 412.

It is not claimed that there was an open mine upon the premises in dispute at the time the lease was executed, and while one of the chief objects in view, if not the only one, was to grant, on the one part, and acquire on the other, certain mineral rights, defendant insists that but a mere right to enter, search for, dig and raise minerals, with the right of ownership of the minerals thus raised was granted, and that for such a right ejectment will not lie. The plaintiff claims that the lease from Briggs to Graveraet was intended to and did lease an undivided one-half of the land itself for the period therein mentioned and for the purpose therein stated.

then that said Graveraet, his heirs or assigns, shall have the first refusal to purchase said divided half, on terms to be agreed on between the said parties or their representatives; and said Graveraet shall, on notice to said Briggs, have the right to have said land so divided, or to purchase the same as undivided at any time within this lease, by consent of said Briggs; and in case said parties cannot agree to a division, the price and terms of purchase, then each party shall select one disinterested person, and these two appraisers select a third who shall decide as to a division or purchase, or both; and the award of such appraisers shall bind the respective parties. It is, however, expressly understood that said Briggs retains the use of this land until sold to said Graveraet for agricultural purposes, saving what is needed for mining purposes as above written; and for a description to said quarter section it is known and described as "fractional quarter section;" and further, this lease is only operative after a confirmation of said pre-emption claim, and said Graveraet is to pay one-third of all taxes to be laid on said fractional quarter section during the term of said lease. This lease binds the heirs, administrators, executors and assigns of the respective parties.

"Signed and sealed at Sault Ste. Marie this twenty-eighth day of September, A. D. 1850."

HARLOW v. LAKE SUPERIOR IRON CO.

It would not only be unjust but contrary to the well settled rules of construction to dispose of this case upon any narrow or technical view, based upon any particular word or clause in the lease. When we examine the entire instrument as a whole, we think there is no difficulty in arriving at a correct conclusion, one that will be in entire accord with the intention of the parties making it, in harmony with the surrounding circumstances then existing, and consistent with each and all the various provisions of the instrument itself. And while a consideration of some particular part, if standing alone, might point to a certain definite result, yet we must still recognize the fact that any such clause may be controlled by the connection in which it is used, or by other parts of the same instrument; and that the legal construction or conclusion arising from the entire instrument, may be entirely different from, or even contrary to, and at variance with, the conclusion which a part standing alone would seem to indicate.

The instrument at the outset purports to be a lease of the undivided one-half part of a certain description of land, and if it had gone no further, it is not at all likely that any question could have arisen thereon. This clause is, however, we think, controlled and limited by what follows. It is not a lease of the lands, with the privilege of mining thereon, or together with the ore and minerals to be found upon said lands, nor are there any words contained therein, indicating that this first clause is to be in any way added to, extended, or enlarged by what follows, or that any additional right is intended to be conferred and added thereto. That other rights, rights which the law would not have implied, viz.: to open mines and work them for the lessee's sole benefit, are granted, is clear, but they are not in the nature of additional rights and privileges, but are placed there to limit and define the nature and extent of the clause immediately preceding and of which they form a part.

When the right is thus defined in the lease, it is no longer a lease of the land, to be used by the lessee for

HARLOW v. LAKE SUPERIOR IRON CO.

such purposes, within the limits allowed by law, as he might deem proper, but to be used for a particular specific purpose, so far as might be necessary to the successful accomplishment of that purpose, and for none other. A specific purpose having been thus set forth in the lease, excludes all others which the lessee might otherwise have been entitled to. This mining privilege might of course have been so expressed in the lease as to indicate clearly an intention to confer the same in addition to any and all other rights which the lessee, even without such a clause, would have had; but the language used in this instrument will not authorize any such enlarged construction. Had the lessee or his assignees entered into actual possession of the lands described in this lease, and upon examination ascertained that the mining interest thereon could not be made productive and profitable, and for that or any other reason have concluded not to engage in the business of mining thereon, could they have retained possession of the lands for any other purpose? Could they have taken any of the wood upon said lands and used it except in connection with the mining interests thereon? Could they have erected and maintained buildings thereon for any other purposes? In a word, could they have enjoyed any of the rights and privileges usually enjoyed by lessees under a lease of lands, in case they did not engage in and carry on the business of mining thereon? And if they did engage in and carry on the business of mining thereon, were not the purposes for which such lands could be used confined to such as would make the mining interest on said lands productive and profitable?

They had no right to a use of the land for any purpose except as an incident to the mining right granted. While engaged in mining, the lessees could use so much of the land as would be necessary for that purpose, but they could use it for no other. In case the mining business proved unprofitable and was abandoned or not carried on, then they were not entitled to the possession or use of the land for any purpose. In other words, if plaintiff's claim is cor-

HARLOW v. LAKE SUPERIOR IRON CO.

rect, that the lease was one of lands, with the right of mining in addition thereto, then the result would be that they had a lease of lands without any of the usual rights or incidents pertaining thereto; they had a grant of land so limited as to make the grant itself of no effect, while the additional or mining right gave them, as a necessary incident, certain rights in the land. The additional privilege of mining gave them all their rights in the land, while the lease of the land itself gave them no rights whatever therein. It is almost needless to say that we cannot adopt the theory of the plaintiff.

The interest or right leased was an undivided one, and gave the lessee the right to prospect upon any part of the lands and open and work such mines as he might deem proper, with the further right to appropriate to his sole use and benefit all ores and minerals procured by him. He had also the right to obtain wood for said purposes, to erect and maintain buildings suitable and needful for the business. All these rights were expressly granted, and that the rights thus granted might be fully enjoyed, all necessary privileges in the land would pass as incident thereto.

What, then, is the extent of the lessee's interest in the land itself under such a lease? This must be determined from the extent of his mining operations. If he opened one or more mines and erected buildings suitable and needed for the business, it would seem that for such purpose at least, and perhaps others in connection therewith, he would be entitled to the exclusive possession of portions of the soil, and that an undivided half interest would not be sufficient for such purpose. And if it appeared in this case that the lessee or his assignees had entered upon the land, opened mines, erected buildings and in other ways taken actual possession of some definite parcel or parcels of the land, from which they had been ousted, and had brought their action to recover possession thereof, a different question would have been presented. But until actual possession of some part of the land is taken, their right therein is floating and

indefinite; it is a mere incorporeal right which is not capable of enforcement by an action of ejectment.—3 *Blackstone*, 206; *Tyler on Eject.*, 41, and cases cited.

There are other provisions in this lease strongly corroborative of this view. The lessor expressly retains the use of all this land for agricultural purposes, "saving what is needed for mining purposes." There is nothing in the case tending to show that either now or at the time this lease was executed, these lands were capable of or could be used for any purpose other than mining or agricultural purposes. Even if they were, the fact that the lessor retains, for the entire term, their use for agricultural purposes, which would necessarily exclude their use by the lessee for any purpose except mining, shows that the lessee's interest in the land was a mere incidental one, dependent upon the mining right; and the clause relating to taxation favors the same view. It is, however, insisted by the plaintiff that the provisions in the lease by which the lessor agrees not to sell, assign, or encumber "said undivided interest hereby leased," unless the lessee or his assigns shall have the first refusal to purchase the same, or, "if said quarter-section be divided, then that said Graveraet, his heirs or assigns, shall have the first refusal to purchase said divided half," and also giving Graveraet the right to have the land divided, are all inconsistent with any view other than the one taken by the plaintiff. We see nothing in these several provisions inconsistent with the view we have taken, and the nature and extent of the interest leased called for the insertion of some such provisions in the lease to prevent disputes thereafter. At the time this lease was executed it was undoubtedly supposed that the lands described therein were valuable for mining purposes, but whether mining thereon would prove a profitable investment or not, was something that could not then be determined. Even if rich in minerals, large sums of money must be expended in prospecting, opening mines and developing its mineral resources. If it proved profitable the lessee would be anxious to have his tenure enlarged, and

HARLOW v. LAKE SUPERIOR IRON CO.

rather than have an incumbrance placed upon the property, they provided that the lessee should first have the privilege of purchasing.

The right leased was that of an undivided one-half. This would give the lessee the right to prospect over the entire lands and open and work as many mines as he might have thought proper. This right he could undoubtedly have assigned or conveyed to a copartnership or corporation, giving it the same right. But he could not, we think, have cut and carved it into several distinct and separate rights, to be held and operated by more than one person, company or corporation. It was, we think, a single right, and could not be subdivided, although it might be owned and operated by a single body composed of several individuals.—*Caldwell v. Fulton*, 31 Penn. St., 476. Now the right granted by the lease being an undivided one-half, a similar right remained in the lessor. He or his assignees or grantees could also open and work mines upon this same property. And it is highly probable that if mining upon the property proved profitable, a conflict might arise between two individuals, companies or corporations, each owning an undivided half, with the right in each to appropriate to its sole use and benefit all ores and minerals it might procure from said land, and that a division to prevent such a conflict would be necessary. It was but reasonable therefore, and a wise forethought, to provide for a division of their rights, or even for a division and sale of the lands, and that in case of a contemplated sale, encumbrance, or division by the lessor, that the lessee should have the first privilege of purchasing. Such provisions are not inconsistent with, and could not enlarge the previous provisions of the grant.

That a right such as the one here granted is not exclusive, and does not preclude the lessor from exercising or granting a like right to others, see *Chetham v. Williamson*, 4 East, 476; *Stockbridge Co. v. Hudson Co.*, 107 Mass., 322; *Union Petr. Co. v. Bliven Petr. Co.*, 72 Penn. St., 173.

HARLOW v. LAKE SUPERIOR IRON CO.

Looking then at the apparent intention of the parties as collected from the whole context of this lease, and at what was done under it, we are of opinion that the lessee acquired no such interest in the land as would enable him or his assignees to maintain an action of ejectment for any particular part thereof or interest therein, and that the court did not err in striking out and excluding from the evidence the lease and assignment thereof, and in instructing the jury to find a verdict for the defendant. Upon the other questions we express no opinion.

The judgment must be affirmed, with costs, and the record remanded for further proceedings under the statute.

The other Justices concurred.

The City of Grand Rapids v. David Hastings.

Plats: Acknowledgment: Seal: Record: Evidence: Highway. Under a statute requiring the acknowledgment of plats to be under the seal of the acknowledging officer (*Comp. L. 1871, § 1345*), a recorded copy of a plat, bearing the certificate of a notary which is not under seal, is insufficient to establish the plat, and to prove the existence of a highway by dedication by the proprietors. Unauthorized records of plats are not made *prima facie* evidence of their execution and validity.

Heard January 19. Decided April 4.

Error to Superior Court of Grand Rapids.

Henry E. Thompson and *W. Wisner Taylor*, for plaintiff in error.

Emil A. Dapper and *John A. Fairfield*, for defendant in error.

CAMPBELL, J:

The city of Grand Rapids brings error on a judgment

GRAND RAPIDS v. HASTINGS.

recovered against it by defendant in error, for the obstruction of a highway by building a reservoir across it, whereby he was damaged as a lot owner. The city had taken no steps to vacate the highway or any part of it, and the chief contention was as to the dedication and acceptance of the street, and the damages.

The foundation of the public right was in a plat purporting to be made by the owners of the land. Proof was introduced by producing the recorded copy, and not the original, and this, although bearing the certificate of a notary, was not under his seal. At the date of this plat, October, 1872, the law required the acknowledgment of plats to be under the seal of the acknowledging officer.—*C. L.*, § 1345.

Our attention has not been called to any statute making the unauthorized record of plats *prima facie* evidence of their execution and validity.

Although the objections to the rulings of the court are in some respects informal, yet we find nothing in the record before us to indicate that there was any other adequate evidence of dedication by the owner of the land. Title was not shown in the parties making the plat, so far as we can determine, and it does not appear from the printed return that any recovery could have been had without the production of the registry. There was evidence tending to prove corporate action, but it meant nothing independent of the plat. There was a second plat properly acknowledged under the amended act of 1873, but it does not in any way identify or help out the plat of 1872, which covered the property in dispute.

We think the court erred in receiving the earlier plat, and that it should have been ruled out.

The other objections to testimony as set forth in the record are very vague, and the rulings refusing charges asked by the plaintiff in error were not excepted to. It would therefore be of no use to discuss questions which if

GRAND RAPIDS v. HASTINGS.

raised again will probably come up in a better shape for decision.

Judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

Henry Armitage v. Jesse C. Widoe.

Contracts: Assent. A contract made by a father in his infant son's name, and without the knowledge of the son, is of no binding force upon the son until he has in some way assented to it, and does not, therefore, of itself confer upon him any rights.

Contracts: Adopting unauthorized acts of another: Agency: Authority. The real force and effect of the son making his own by adoption the contract thus made in his name by his father, is to retrospectively make the father his agent, or to give the father authority retrospectively, by claiming as his own that which without authority at the time was made in his name.

Infancy: Agent: Attorney: Ratification. An infant cannot empower an agent or attorney to act for him; and he therefore cannot affirm what another has assumed to do in his name as an agent or attorney. He cannot affirm what he could not authorize. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.

Infancy: Gifts: Benefit to infant: Presumptions: Acceptance. There can be no presumption that a gift to an infant of a contract for the purchase of land at the price of thirteen thousand dollars, and upon which only four hundred dollars has been paid, is for the benefit of the infant; and even if he were an adult, acceptance could not be presumed, of a contract binding him to the payment of a large sum of money, in the absence of express evidence to establish it.

Infancy: Gift of a contract: Consideration paid: Repudiation. The gift by a father to his minor son, of a contract for the purchase of land, which he had before made in the son's name without his knowledge, will not entitle the son to recover back from the vendor the payment which the father had before made on the contract. The right to repudiate a contract is not the subject of gift.

Infancy: Voidable contract: Disaffirmance. An infant has no right during his minority to disaffirm a voidable contract of purchase.

Heard January 19. Decided April 4.

Error to Superior Court of Grand Rapids.

ARMITAGE v. WIDOE.

Thompson & Pratt, for plaintiff in error.

If the written contract in question is one voidable by the infant party before his coming of age (*Tyler on Infancy*, 67-9; *Gaffney v. Hayden*, 110 Mass., 137; 33 Conn., 201), which was the view the court below took of it, then the plaintiff was entitled to recover by showing his non-age and payment to and receipt by defendant of the four hundred dollars on the contract. But the court submitted to the jury the incompetent evidence tending to show the incidental benefit plaintiff's father expected to derive in a contingency from his son's ownership of the property, and instructed them the only question in the case was whether the contract was made for the benefit of the father. This was erroneous: (1) Because the contract as matter of law conclusively determined the party to whose legal use the money was paid, and established the plaintiff's right of action for it, and it was not competent to contradict or amend that contract, or make a new one, by parol: *Newcomb v. Clark*, 1 Denio, 226; *Lincoln v. Crandell*, 21 Wend., 101; *Harp v. Osgood*, 2 Hill, 216; (2) Even if competent to submit the question to the jury, whether the contract was for the benefit of the father, still it was error to instruct them, as the judge did, that the plaintiff could not recover; for the right of action was still in plaintiff, and even if restricted to the same grounds of recovery that the father would have been had he been named as the party to the contract, he would be entitled to recover by showing that defendant failed to show title or was otherwise in default, of which there was proof: *Chitty on Contrs.* (7 Am. ed.), 622; and the court should have explained those matters which he told the jury had nothing to do with the case; (3) Because the judge, in submitting these propositions to the jury, submitted the question whether the contract was that of plaintiff, without instructing them, as requested by plaintiff, that a subsequent ratification of and assent to the act of his agent in making the contract, by the plaintiff, was a sufficient adoption of the contract as his, or some instruction of equivalent import: *Hammond v. Hamlin*, 21 Mich., 374; *Fleckner v. Bank*, 8 Wheat., 338, 363.

If the contract as matter of law is one not voidable by the plaintiff during infancy, then he was entitled to recover by proving that defendant failed or refused to perform the terms of the contract on his part: 21 Mich., 374; *Demarany v. Gravelin*, 56 Ill., 93; and there was evidence on this subject. And the court, therefore, ought not even in this view to affirm the judgment, but should order a new trial to permit plaintiff to have the question of his right to recover by reason of defendant's default passed upon by the jury.

ARMITAGE v. WIDOE.

Champlin & More, for defendant in error.

It is evident this suit was originally planted on the hypothesis that the contract was one between plaintiff and defendant, and that the former had fully performed and the latter had failed to perform in such a material part as excused plaintiff from further performance and entitled him to rescind the contract and sue to recover back the money paid down. But on the trial this position is changed and plaintiff now claims he was a minor when the contract was executed, and that it was made by his father for and on his behalf, without express authority, and that he ratified the act and assented to it, and then disaffirmed it, and is thus entitled to recover in this action the money paid by his father.

The plaintiff being, at the time the contract was made, a minor, was under a legal incapacity to appoint an agent or attorney, and was under the same incapacity to assent to or ratify an act of agency during his infancy, which lasted up to the time of the trial: *Tucker v. Moreland*, *Vasse v. Smith*, *Am. L. C.* (5th ed.), 304-5; *Saunderson v. Marr*, 1 H. Bl., 75; *Robbins v. Mount*, 33 How., 24; *S. C.*, 4 Rob., 553; *Fonda v. Van Horne*, 15 Wend., 631; *Stafford v. Roof*, 9 Cow., 626; *Hiestand v. Kuns*, 8 Blackf., 345; *Cole v. Pennoyer*, 14 Ill., 159; *Thomas v. Roberts*, 16 M. & W., 778; *Trueblood v. Trueblood*, 8 Ind., 196; 18 Ind., 268; *Lawrence v. McArthur*, 10 Ohio, 37; *Pyle v. Cravens*, 4 Littell, 17; *Traples v. Hastings*, 3 Harr., 403; *Semple v. Morrison*, 7 Monr., 298; *Knox v. Flack*, 22 Penn., 337.

Rights founded on a contract belong to the person who has stipulated for them: *Alton v. Midland R. R. Co.*, 19 C. B. (N. S.), 240; the person to sue for the breach of a simple contract must be the person from whom the consideration for the promise moves: *Dacey on Parties*, 97.

If the plaintiff had in fact been bound by the contract, he could not have recovered back the consideration paid, under the testimony disclosed in this record. It seems contrary to justice that he should be permitted to recover it back because he was not bound by any contract. If he can do so, it must be because, either: (1) The money when paid was absolutely his money, and the consideration for which it was paid has failed, or some other fact has arisen which entitles him to demand the money from defendant; or (2) some other party had a right prior to the commencement of this suit to demand the money in question from defendant, and plaintiff has succeeded to such right. And it is not claimed plaintiff occupies either of these positions, but he claims the money was paid for him, and that such payment is equivalent to a payment by him. While that proposition may be true in certain cases,

ARMITAGE v. WIDOE.

it evidently cannot be in this. It is impossible to disconnect the payment of the money from the attendant circumstances. And these circumstances show plaintiff was an entire stranger to the transaction in fact, and he has continued to be an entire stranger to it.

There must be a contract between the plaintiff and defendant before it can be ratified by the plaintiff; and likewise must there be such a contract before it can be disaffirmed and repudiated. And there was no contract between plaintiff and defendant for two reasons: (1) The father had no authority to act for his infant son as agent in making the contract; and (2) the infant son was legally incapacitated from conferring such authority, and *a fortiori* from ratifying such assumed agency. Hence there never was any contract which the infant could disaffirm existing between the infant plaintiff and the defendant. This disposes of the plaintiff's right of action.

COOLEY, CH. J:

This action is brought to recover back four hundred dollars paid in the plaintiff's name on a contract for the purchase of lands. The contract was entered into April 24, 1875, and purports to be between Jesse C. Widoe as vendor and Henry Armitage as vendee. The purchase price was thirteen thousand dollars, of which three thousand dollars was payable on or before May 10, 1875, and the balance in ten annual installments of one thousand dollars each, with annual interest. Henry Armitage was about seventeen years of age at the date of the contract, and his name was signed to it by William H. Armitage, his father. The plaintiff, by his own evidence showed that he was ignorant of the contract at the time it was made, and never saw it until after this suit was brought; that he had no money to pay upon it and did pay none; and that his father told him what had been paid on the contract was to be recovered back in his, the son's, name. The father was sworn as a witness, and testified that he made the contract and paid the money for his son, and that the son afterwards, on being informed of it, assented to what had been done. There is some complaint of refusal or unwillingness on the part of

ARMITAGE v. WIDOE.

the defendant to perform the contract on his part, and on the contrary he relies upon it as a valid contract, and offers to perform, but the suit appears to be grounded upon the right of an infant to disaffirm his contract and recover back what has been paid upon it.

I. Obviously the first question in the case is, how this infant, who had nothing to do with the making of this contract in the first place, has become entitled to any benefit under or because of it. If he has any right at all, it would seem that he must have acquired it in one of three ways; no other being conceivable. These are—

1. By virtue of the contract itself, made in his name, and which, though made without his knowledge, purported to assure to him rights which we may suppose were of value;

2. By the adoption of the act of his father in making the contract;

3. By accepting the contract as a gift from his father.

It is not claimed, as we understand it, that by the contract itself, independent of any action afterwards taken, the infant would have had any rights at all. No contract is binding upon any party until he assents to it. Even a deed must be delivered and accepted; and much more must a contract be which contains onerous conditions, and assumes to bind the party to the payment of a large sum of money. Any suggestion therefore, that the contract as made entitled the infant to any rights, may be dismissed from consideration. If when made it was a valid contract in favor of any one as vendee, it must have been in favor of the father, who, having made it in the name of another person without authority, might possibly have been compelled to perform it as his own contract, and been entitled to the benefit of it as his own. What rights there may have been by or against him, we need not consider, as they are not involved in this litigation.

II. If the contract became that of the infant through the adoption of the act of his father in making it, it must be because the infant has thus retrospectively made the

ARMITAGE v. WIDOM.

father his agent. This, and this only, must be the force of the adoption; it is giving authority retrospectively, by claiming as his own that which without authority at the time was done in his name.

Had the infant in the first place undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. On the authorities no rule is clearer than that an infant cannot empower an agent or attorney to act for him.—*Whitney v. Dutch*, 14 Mass., 457, 460; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Fonda v. Van Horne*, 15 Wend., 631, 635; *Trueblood v. Trueblood*, 8 Ind., 195; *Cole v. Pennoyer*, 14 Ill., 158; *Knox v. Flack*, 22 Penn. St., 337; *Sadler v. Robinson*, 2 Stev. (Ala.), 520; *Robbins v. Mount*, 4 Robt., N. Y., 553. But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize.—*Doe v. Roberts*, 16 M. & W., 778, 781; *Fonda v. Van Horne*, 15 Wend., 631, 636; *Trueblood v. Trueblood*, *supra*. It would be extraordinary if a party who has no power to do a particular act could yet do it indirectly by the mere act of adoption. Such a doctrine would deprive the infant wholly of his protection; for one has only to change the order of proceeding, assume to act for the infant first and get his authority afterwards, and the principle of law which denies him the power to give the authority is subverted. But such a doctrine is wholly inadmissible. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.

III. Did the infant become entitled to the contract by the gift of his father? That he did, might perhaps be claimed with some degree of plausibility had the payment made on the contract been the whole or the principal part of the purchase price. But the payment was in fact insignificant when compared with what remained to be paid. If the infant took the contract, he took it with all its conditions, one of which was the payment of the sum of twelve

ARMITAGE v. WIDOM.

thousand six hundred dollars in the manner provided for therein. Now there can be no presumption whatever that such a gift was for the benefit of the infant,—and even if he were an adult, acceptance could not be presumed without some express evidence to establish it. In this case, instead of there being evidence that the infant accepts the contract, the suit itself assumes that he rejects it.

But treating the act of the father as a gift to his son, how does this entitle the son to demand and receive back the four hundred dollars paid on the contract? This sum never belonged to the son, and there is no pretense that it was ever given to him. The gift was of a right under the contract acquired by means of the payment of this sum. This right is offered to the son, and according to the testimony of the father, he at first accepts it, but then turns around and says in effect: “No, I will not take this right, but I will demand and have what was paid for it.” If he may do this, then what he obtained from his father was not the contract itself, but the right to repudiate the contract. But the right to repudiate a contract is not the subject of gift at all. Besides the father never had it to give. If the contract was valid in his hands, he could not repudiate it, and he could not empower another to do what he could not do himself.

In what has thus far been said, we have not touched upon the authority of the infant to disaffirm a contract of purchase before coming of age. If the contract had become his in any way, it would be, we take it, only a voidable contract, and in *Dunton v. Brown*, 31 Mich., 182, the right to disaffirm a voidable contract during infancy was denied. But it is enough in this case to show that the infant never became entitled either to the contract or to the moneys paid under it.

The judgment must be affirmed, with costs.

The other Justices concurred.

REYNOLDS v. CONTINENTAL INSURANCE CO.

James S. Reynolds v. The Continental Insurance Company.

Agency: Authority: Evidence: Assumption of authority by the agent. Upon the question whether a party had authority to do an act as agent of another, evidence of the fact that he assumed to do the act cannot be made use of as evidence that the power so assumed actually existed.

Agency: Authority: Evidence. Rulings excluding evidence offered to prove agency become immaterial where the agency is afterwards proved by the introduction of the written agreement of agency, which is not disputed.

Agency: Insurance: Custom: Evidence. The exclusion of a question put to an agent residing in a different part of the county, requiring him to state as far as he knew what the usual custom was in the county as to insurance agents taking risks in all kinds of property, is not error, where the witness has before stated distinctly what his own practice was and that he knew nothing of the practice at other agencies and that the same companies did not give like powers to all agents. The existence of such a practice at one place could not be inferred from such evidence of its existence at another.

Insurance: Agency: Special risks: Acting as local agent: Authority. Where an agent's written commission expressly excludes authority to insure manufactories and other special hazards, the mere circumstance that he acts as the company's local insurance agent, is not tantamount to a declaration by the company that he has authority to insure every kind of property and to exercise unlimited authority as to risks, modes and terms. By itself, it could imply nothing more than authority to insure in the mode required by the company's charter and to take such risks as the policies of the company in common use by its agents would warrant.

Practice: Exclusion of evidence: Bill of exceptions: Propositions of proof. To sustain an allegation of error which complains of the exclusion of evidence offered, the bill of exceptions must make it affirmatively appear that the exclusion was error. In submitting a proposition of proof, counsel are bound to be distinct and clear, and the proposition should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled in the intended sense by the trial judge, and to be examined and applied in the appellate court in the proper light to test the accuracy of the ruling if an adverse one.

Propositions of proof: Implied meaning. Where a trial court has excluded a proposition of proof, his decision, if correct as it appeared, cannot be questioned in an appellate court upon the claim of the party who made the offer, that the proposition covered some implied meaning which required a different ruling.

Propositions of proof: Construction: Acquiescence. And where the trial judge's construction of the meaning of a proposition of proof is virtually assented to by counsel at the time, the correctness of that construction ought not to be afterwards questioned in the court of review, unless at least the new construction sought to be imposed upon it is one to which it is fairly open.

REYNOLDS V. CONTINENTAL INSURANCE CO.

General proposition to prove case made by declaration. A mere general proposition in so many words to make out the case set forth in the declaration, is not one that the court is bound to take into consideration and rule upon as an offer of proof; it is no more than the declaration has already proffered, and in better form.

Insurance: General proposition of proof: Practice. Where in an action to charge an insurance company upon an alleged agreement for insurance, claimed to have been made with their agent, the case has failed for lack of proof of authority in the agent to take the specific risk, and the plaintiff has been three times upon the stand as a witness and has testified to the payment of the premium to the agent but that he did not know whether the agent had paid it over to the defendant, the rejection, at the close of the trial, of a general offer to prove by the plaintiff as a witness the necessary facts to entitle him to recover of defendant, etc., and "that they received the money for the insurance and kept it," is not error, where the offer is so presented as fairly to appear rather as a compendious reassertion of positions already ruled, than as a regular offer of proof of facts to make out a case.

Heard January 23. Decided April 4.

Error to Washtenaw Circuit.

Beakes & Cutcheon, for plaintiff in error.

If the defendant received the plaintiff's money for the insurance and kept it, as he offered to prove, it was a ratification of the contract. The company could not repudiate the contract while retaining its consideration. At any rate the evidence was admissible to go to the jury, as one of a series of facts which (with others the plaintiff had a right to prove) would tend to show a ratification of the insurance contract. The question here is not whether that fact alone would be sufficient of itself to bind the defendant, but whether it was so utterly immaterial to the issue that the plaintiff could not be harmed by its exclusion.

The plaintiff was allowed, it is true, to show that he paid the insurance premium to the defendant's agent, Kirchhofer, and that the money had never been returned to the plaintiff; but if the defendant denied that to be a sufficient payment to the company, it was competent to show its payment to the company. On the other hand, if the payment to Kirchhofer was a sufficient payment to the company, then we submit that the court erred in taking the case from the jury by the charge. In a controversy between these parties we suppose it to be a fair presumption of law (in the absence of contrary proof) that the agent did his duty by reporting this insurance and by forwarding to the defendant the plaintiff's money, which he obtained while acting, or at least professing to act, in be-

REYNOLDS v. CONTINENTAL INSURANCE CO.

half of the defendant in making an insurance contract the company had the right to make. That Kirchhofer's only relation to this company was that of agent, authorized to receive premiums, and make insurance contracts in its behalf, is perfectly clear. That it was his duty to pay over or account to the company for all insurance premiums received on whatever insurances he made, or undertook to make, on its account as agent, is equally clear.

Courts have gone quite as far in other cases to charge the principal at the suit of third persons on the presumption that in the ordinary course of business the knowledge of the agent would naturally become the knowledge of the principal; and that it may be assumed, *prima facie*, that what would naturally happen between parties in fiduciary relations, did happen. So when a man employs an attorney, whatever may be the special directions, the adverse party and the public have the right to suppose, unless informed to the contrary, that the attorney has the usual powers of an attorney, and the attorney's concessions on the trial, though against the instructions of his client, are binding. So as to brokers and others, the principal, by implication of law, confers upon them the usual powers incident to their occupation.—*Story on Agency*, §§ 106, 94, 85; *Nickson v. Brohan*, 10 Mod., 109; *Andrews v. Kneeland*, 6 Cow., 354; *Loddell v. Baker*, 1 Met., 195, 202; *Gibbs v. Boies*, 13 Vt., 208, 214; *Laussatt v. Lippincott*, 6 S. & R., 386, 393; *Chitty on Contracts*, 199, 200, marginal paging.

In this case it will be seen that the general occupation of Kirchhofer was that of an insurance agent, insuring all kinds of property, when appointed by the defendant. The date of the certificate of appointment is June 23, 1874, and he had been engaged in the business over a year prior to July 18th, 1874.

A local insurance agent, with power to insure, or having blank policies to be filled out and issued by him, is a general agent in the sense of the law: *May on Insurance*, 126; *Carroll v. Charter Oak Ins. Co.*, 40 Barb., 292; *Post v. Aetna Ins. Co.*, 43 Barb., 257. The possession of blank policies, signed by the officers of the company, is evidence of a general agency: *Pitney v. Glens Falls Ins. Co.*, N. Y. Com. of Appeals (Decided in January, 1875), 4 Ins. Law Journal, 776.

The power of such an agent in a stock company is plenary. He may make such memoranda and endorsements modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seems proper: *Pitney v. Glens Falls Ins. Co.*, N. Y. Appeals, 4 Ins. Law Journal, 776, 777.

REYNOLDS v. CONTINENTAL INSURANCE CO.

Such an agent has an implied authority to alter the printed blanks so as to cover risks which would not otherwise be insured against: *Gloucester Mfg. Co. v. Howard Ins. Co.*, 5 Gray, 501, 502.

So, too, an agent entrusted with blank contracts of insurance to be filled by him, may by erasures in the printed blanks convert an alternative or conditional contract into an absolute one, and if his want of authority is not known to the assured, the company will be liable: *Dayton Ins. Co. v. Kelly*, 24 Ohio St., 345, 356, 359, 365.

Though printed policies in the hands of the agents provide expressly that they shall not be valid until countersigned by the agent, a policy delivered by such agent as a completed instrument is valid, though not countersigned: *Hibernia Ins. Co. v. O'Connor*, 29 Mich., 241; *Westchester Ins. Co. v. Earl*, 33 Mich., 143.

In this case, Kirchhofer had in his possession blank policies signed by the proper officers of the company, and was entrusted with the power of filling them. The effect of this was to give him a *carte blanche* to insure any property he pleased, and to write over the official signatures furnished him any form of insurance contract. There is no safety for the public under any other construction. In *Lighbody v. North American Ins. Co.*, 23 Wend., 18, will be found a case not distinguishable in principle from this.

If the defendant shall claim that the policies were sufficient notice to Reynolds that Kirchhofer was not authorized to insure mills, we answer:

1. It does not appear that the policies that Kirchhofer had at the time of the contract of insurance contained any notice or mention of restricted authority. The policy (Exhibit B) tendered by Kirchhofer *after the fire*, and which Reynolds refused to receive, contained a statement that it should not be valid "unless countersigned by Samuel Kirchhofer, the agent of this company for insurance of property other than manufactories and other special hazards." But this policy was never seen by Reynolds before the fire. In fact it was not drawn until after the fire; and Reynolds had no information that the policies contained any such statement—if, in fact, they did contain it. Exhibit B is therefore immaterial to the case.

2. The company being authorized to insure mills or other special hazards, the delivery of a blank policy signed by the president and secretary (which was adapted as well to the insurance of manufactories as of any other property) to the de-

REYNOLDS V. CONTINENTAL INSURANCE CO.

defendant's sole agent at Manchester, was a sufficient expression of the company's assent, through its chief executive officers, to its being so filled as to insure manufactories, or any property to which the form of policy was adapted. The delivery to any person of a blank policy *so signed*, would confer sufficient authority to bind the company if filled up by him with any description of property, provided only that the countersignature or assent of Kirchhofer should be obtained—assuming, of course, that the assured acted in good faith. There are no words of prohibition to Kirchhofer. The words are merely by way of description, or identification, and it was of course competent for the company to enlarge the powers of an agent originally limited, or to use him as the medium of delivering any kind of policy.

3. An ordinary person in reading the policy, Exhibit B, would understand that it was only essential that *Kirchhofer* should countersign it before delivery, and not as any limitation in the contract, or in the kind of property which such a policy might insure. Any other construction would make it misleading and deceptive. There is no declaration that the policy shall not be valid to insure manufactories and special hazards.

Ashley Pond, for defendant in error.

Plaintiff, sworn as a witness on his own behalf, testified that in July, 1874, and prior to that time, one Samuel Kirchhofer, with whom the alleged contract for insurance was claimed to have been made, resided at Manchester, and that his business was that of insurance agent. Witness was then asked: "For what companies was he (Kirchhofer) acting?" The question was objected to by defendant's counsel, and the objection sustained, and this ruling is the basis of the first assignment of error.

I submit that the ruling was correct. If the question is to be construed to mean, for what companies Kirchhofer *purported or appeared* to be acting, the answer could have had no tendency to prove that he was in fact an agent of the defendant corporation. On the other hand, if it is construed to mean, for what companies he was *in fact and by authority* acting, preliminary questions were required for the purpose of showing that the witness had some proper means of knowing. The fallacy of permitting him to answer such a general question without first having given some evidence tending to show his means of knowledge, is clearly demonstrated by his subsequent testimony, from which it appears that he had no such means of knowledge and no knowledge.

REYNOLDS V. CONTINENTAL INSURANCE CO.

The ruling which is the basis of the first assignment of error having been made, counsel for defendant produced a certificate of appointment of said Kirchhofer as agent for the defendant, and the same was put in evidence on behalf of the plaintiff, and a copy is annexed to the bill of exceptions. This appointment bears date June 23, 1874; but it was admitted on behalf of defendant that it was received by Kirchhofer prior to the 18th of July, 1874. By the terms of this appointment Kirchhofer had no authority to make insurance upon the class of property which the declaration alleged to have been covered by the supposed agreement. And plaintiff's counsel thereupon called as a witness one Chauncy H. Millen, who testified that he had resided at Ann Arbor about forty years, and had been an insurance agent over twenty years, and represented five different companies, two for all, and the residue for a portion of that time. In answer to the following question, to-wit: "What has been the usual custom of insurance companies doing business in the county of Washtenaw, so far as you know, as to the issuing of policies—by whom have they been issued, as a general rule upon all classes of property, whether by the company or local agents?" Witness stated: "The general rule of myself has been to issue the policies from my agency." Plaintiff's counsel then put the following question: "Has that been the general custom of insuring in this county, so far as you know?" The question was objected to by defendant's counsel, and the objection sustained, and this ruling is the basis of the second assignment of error.

I submit that the question was properly excluded. The witness testified that the companies which he acted for gave greater authority to some agents than to others, and he subsequently testified that he knew nothing of the custom referred to outside of his own agency.

The fourth, fifth and sixth assignments of error involved the single question whether the court properly refused to permit the plaintiff to show the alleged agreement for insurance made with Kirchhofer, and instructed the jury to render a verdict for the defendant.

I submit that no other course was open. The burden was upon the plaintiff to show the authority of the agent to make the contract counted upon. Of course I do not contend that it was necessary for him to show that such authority had been expressly given. If he could have produced evidence tending to show that Kirchhofer had been held out to the public as having such authority, or had, with the knowledge of the defendant, been permitted, in one or more instances, to

REYNOLDS v. CONTINENTAL INSURANCE CO.

exercise like authority, it would undoubtedly have been admissible; but his case was barren of any evidence that Kirchhofer had ever assumed to act for the defendant corporation in any other transaction than the one in question, and in fact he had never so acted.

The theory which seems to have pervaded the mind of plaintiff's counsel, that insurance agents possess general and uniform powers of which courts are bound to take judicial notice, is clearly unfounded. "No court can have judicial knowledge of the powers of all insurance agents. In order to bind companies for the unauthorized acts of agents, there must be something in the course of the business which the party dealing with them has fairly a right to rely on, and there must have been an honest reliance in fact. In other words, dealing with them must be governed by the same rules applied to other persons." *Per Campbell, C. J., in Security Ins. Co. v. Fay, 22 Mich., 467.*

The existence and extent of the authority must be proved as a fact: *May on Insurance, § 173; Meister v. The People, 31 Mich., 107.* If the authority is express and in writing, the company cannot be bound by an act of the agent not within such written authority, unless it has so acted or permitted the agent to so act as to justify the public or the plaintiff in believing that the agent has other or greater powers than those given by the written authority: *Farmers' Ins. Co. v. Taylor, 73 Penn. St., 342.*

In this case there is no pretense that Kirchhofer had exercised any authority, with or without the knowledge of the defendant company, inconsistent with the written authority which had been given to him. Plaintiff had no information as to his authority, except Kirchhofer's own oral statements; and if a policy had been issued and delivered to him by Kirchhofer, and he had read it, he would have learned that Kirchhofer was not authorized to make insurance upon property of the character in question.

Mr. Justice Swayne, of the Supreme Court of the United States, in deciding a case recently before him on writ of error from the circuit to the district court, remarked that he had learned from experience that a cause when read in print frequently appeared widely different from his understanding of it in manuscript, and the learned counsel for the plaintiff in error in this case seem to have had some such experience, as upon reading the record in print they have discovered, or think they have, a point they deem of great importance to their client, which they wholly overlooked whilst the record

REYNOLDS V. CONTINENTAL INSURANCE CO.

was in manuscript, and have accordingly amended their assignment of errors.

The bill of exceptions purports to be, and probably is, a literal transcript of the short-hand writer's minutes of the trial, and in it appears the following paragraph:

"We now offer to prove by the witness the other facts alleged in the declaration, *not proposing to offer any other evidence on the subject of agency*, but the other facts to entitle us to recover \$3,000, with interest from the 4th day of August, 1874, the day of the fire,—that they received the money for this loss and kept it."

By the original assignment of errors the only complaint based upon this part of the record was, that the court refused "to allow the plaintiff's counsel to show the other facts alleged in the declaration (other than the evidence on the subject of the agency of Kirchhofer.)" The assignment as amended complains of the refusal of the court to permit the plaintiff to show that the defendant had received the premium for the alleged insurance in question and kept it.

Of course the only relevancy of evidence to show that the defendant received the premium for the alleged insurance would lie in its tendency to establish a recognition or ratification by the defendant of authority in its agent to make the contract of insurance counted upon. In order therefore, to be of any value to the plaintiff in error his proposition must be construed as an offer of evidence sufficient to authorize the jury to find such recognition or ratification; and this being so, I am not surprised that the learned counsel for the plaintiff overlooked the point now made, in drafting the original assignment of errors, because the fact was well known to be that the insurance company had never done anything which could possibly be construed as a recognition or ratification of the alleged contract of insurance made by the agent, and had never received this premium, and so naturally plaintiff's counsel would not expect to find in the record a proposition to make such proof.

Upon the merits:

1. I submit that the proposition, as it appears in the record, is too vague and indefinite to justify this court in holding that the court below erred in not permitting the plaintiff to make the proof he now assumes that he offered to make.

The entire record shows that the court intended to be and was liberal toward the plaintiff in permitting him to give any evidence which could have any tendency whatever to show authority in the agent to make the contract under considera-

REYNOLDS v. CONTINENTAL INSURANCE CO.

tion. His counsel was permitted time and again to resume and give testimony after obtaining a ruling from the court upon that already in, and to call and recall, and examine and re-examine their client upon the subject of the alleged agency; and the primary and principal proposition contained in the paragraph of the record in which the language under consideration occurs, was to show "*other facts alleged in the declaration,*" and not to show other facts to establish the authority, either original or by subsequent recognition or ratification, in the agent, but, on the contrary, expressly disclaiming any intention to "*offer any other evidence on the subject of agency,*" so that neither the attention of the opposite counsel nor the court could have at all been attracted to what is now claimed to be the real, material gist and scope of the proposition.

2. And further, I submit that the proposition literally proved would not furnish evidence sufficient to submit to a jury as tending to show that the defendant had recognized or ratified the alleged action of the agent.

The language is, "that *they* received the money for the loss, and kept it." And the context does not show who is meant by the pronoun "*they*." The proposition literally would be as true if the agent received the money and kept it, as if the defendant received it and kept it.

Moreover, proof that the defendant received the money paid as a premium for the insurance counted upon and kept it, would not be sufficient, standing alone and unexplained, to bind the defendant as recognizing or ratifying the action of the agent. The proposition should have been clear and distinct to show that the defendant, knowing the contract upon which and the circumstances under which the money had come to the possession of the agent, received it from him and retained it.

3. Finally, it does not appear that any exception was taken to the ruling upon the proposition under consideration. The ruling to which an exception was taken was in answer to a subsequent proposition of counsel for the plaintiff in the following language, to-wit: "We offer to prove the other facts to entitle us to recover."

GRAVES, J:

A verdict having been returned by direction of the court against Reynolds, who was plaintiff below, he has brought error.

REYNOLDS v. CONTINENTAL INSURANCE CO.

The action was on an alleged agreement of July 18th, 1874, to insure his interest up to three thousand dollars for one year in a steam mill and its appliances, at Manchester, in Washtenaw county, the property having been destroyed by fire August 3d, 1874, and no policy having been received by him.

He claimed the agreement was made on the part of the company by one Kirchhofer, then its agent at Manchester, and that he paid one hundred and thirty-five dollars as premium.

The insurance company maintained that, conceding Kirchhofer to have been its agent to take common risks, he had no power to take any of the class of plaintiff's, and that if he assumed to agree as alleged, his act was unauthorized, and hence was not a ground of action against it.

Excluding a point now made on the rejection of an offer by Reynolds at the close of the trial, relative to proof, and which will be noticed at the proper time, the record of the trial shows that in the first place Reynolds insisted upon giving evidence of a bargain for the special risk in question, with Kirchhofer, and without any evidence of power in Kirchhofer to make such a bargain; and as ground for maintaining that he was fully justified in regarding Kirchhofer as authorized to bargain for the risk in question, he insisted secondly that he was entitled to prove that there was a practice at other agencies to take such risks; that Kirchhofer was entrusted with policies in blank, signed by the president, and actually solicited the risk and received the premium. These facts, it was claimed, entitled Reynolds to transact with Kirchhofer upon the faith that the latter had power to bind the company by the bargain for the risk in question, notwithstanding the fact, unknown to Reynolds, that the commission and policies debarred Kirchhofer.

The company resisted these claims and contended that before adducing evidence of a bargain with Kirchhofer it was incumbent on Reynolds to prove that Kirchhofer was empowered, and that the practice at other agencies as to the kinds

REYNOLDS v. CONTINENTAL INSURANCE CO.

of risks agents assumed power to take, and the other facts proposed in connection, were without force to sustain the theory on which they were suggested, or to hold the company on the supposed bargain, and hence were inadmissible. This outline will give an idea of the attitude of the parties at the trial.

The court was very indulgent to the plaintiff and allowed great latitude in his various efforts and expedients to get over inherent difficulties. When the trial opened, the plaintiff took the witness stand and having sworn that at and before July 18th, 1874, Kirchhofer acted as insurance agent at Manchester, was then asked by his counsel for what companies he was acting. The question was ruled out and error is assigned upon the ruling. The true object of the question must have been to draw an answer that Kirchhofer was acting for the defendant corporation, and yet it had not been shown that the plaintiff had any other means of knowledge than the very transaction which was in dispute, and surely if Kirchhofer assumed the power the existence of which was the point in issue, his act could not be made use of by the plaintiff as evidence that the power so assumed actually existed.

Immediately after this rejection, plaintiff's counsel put this question: "State whether any agreement or bargain was made for the insurance of your mill property and the fixtures, machinery, etc., contained therein, in behalf of defendant?" and plaintiff at once replied: "Yes, sir, he insured me."

The counsel for defendant then objected that the question did not ask for any bargain with him as agent for the company; that if it did it would be inadmissible until the agency, the authority to make the bargain and agreement, had been proved, and following this objection defendant's counsel produced the commission given by the company to Kirchhofer, and the plaintiff submitted it in evidence. It bore date June 23, 1874, and defendant's counsel admitted that Kirchhofer received it before July 18, 1874. It ex-

REYNOLDS v. CONTINENTAL INSURANCE CO.

pressly excepted from his authority the power to grant policies upon "manufactories and other special hazards," and for the classification of hazards referred to the provisions of the policies of the company. The fact of Kirchhofer's agency was therefore shown at the outset, and there is no plausible ground whatever for the first charge of error. Indeed, the real controversy concerning Kirchhofer's authority was not upon the fact of his being an agent, but upon the extent of his power as agent. That he was actually an agent was not denied.

The next charge of error is founded on the exclusion of a question to the witness Millen.

He was local agent at Ann Arbor for several companies, and had been for many years.

His practice was to take risks on all classes of property. He was aware that his companies gave greater authority to some agents than to others, but he had no knowledge of the course pursued at other agencies. His ability to speak of the practice in this respect was confined to his own agency.

The excluded question required him to state, so far as he knew, what the usual custom was in the county as to agents taking risks on all kinds of property.

As he had already stated distinctly what his own practice was and that he knew nothing of the practice at other agencies, and that the same companies did not give as extensive powers to some agents as to others, the inquiry could only elicit in effect, and most likely in a form calculated to mislead the jury, a repetition of what was the practice at his own agency alone. Again, waiving all questions touching the right to prove that there existed in Manchester a practice to take all risks, and still the practice at that place could not be inferred from the fact of there being such a practice at Millen's agency.—1 *Starkie Ev.*, 618, 619 (*mar.*), and notes.

The precise theory which the plaintiff's counsel had in mind at this point is not readily discerned. Surely he

REYNOLDS V. CONTINENTAL INSURANCE CO.

could not have meant to claim that usurpation of power by agents of one concern, and followed by acquiescence of the principal, could be urged as a reason for holding another concern bound for its agent's unauthorized act, and which was not acquiesced in, but repudiated.

As to whether there was any showing whatever of power in Kirchhofer to make the alleged bargain, the case appears clear.

The plaintiff submitted the commission, and that withheld authority in express terms to take his risk.

It was also shown by plaintiff that the company furnished Kirchhofer with blank policies signed by its president. But such of these as there was evidence to explain excluded such risks. There was no evidence that different ones were ever confided to Kirchhofer, or in fact that the company used any others. No facts were adduced tending to show a grant of greater power than the commission gave. Again, there was no evidence of any act of the insurance company tending to show the creation of any apparent power to exceed the commission and insure such property as plaintiff's. There was not a scintilla of proof that Kirchhofer was held out by the company as authorized to do any thing beyond the terms of the written delegation, or that the company had in any instance acquiesced in an act of his in excess. Indeed, it did not appear that in any instance he had previously assumed to insure property excluded by his commission, and certainly it will not be pretended that his own proceedings, the authority of which was the fact in issue, could be brought forward to sustain that side of the issue which asserted the authority. The single circumstance that he was the company's local insurance agent at Manchester, was not tantamount to a declaration of the company that he had power to insure every kind of property and to exercise unlimited authority as to risks, modes and terms. By itself it could imply nothing more than authority to insure in the mode allowed by the company's charter, and to take such risks as the policies of

REYNOLDS v. CONTINENTAL INSURANCE CO.

the company in common use by its agents would warrant, and we have seen that so far as there was evidence the plaintiff's risk was not within the purview of the policies in use.

There was no evidence of the power conferred by the charter.—*Security Insurance Co. v. Fay*, 22 Mich., 467; *Meister v. The People*, 31 Mich., 99; *Mussey v. Beecher*, 3 Cush., 511; *Markey v. Mutual Benefit Life Ins. Co.*, 103 Mass., 78; *Turner v. Quincy Mutual Fire Ins. Co.*, 109 Mass., 568; *Mechanics' Bank v. N. Y. & N. H. R. Co.*, 3 Ker., 632; *Adraince v. Roome*, 52 Barb., 399; *Risley v. Ind. B. & W. R. R. Co.*, 1 Hun, 202; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y., 594; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y., 531; *Swazey v. Union Manufacturing Co.* (Sup. Ct. of Conn., Sept., 1875); *Kornemann v. Monaghan*, 24 Mich., 36; *Farmers' Ins. Co. v. Taylor*, 73 Penn. St., 342.

Hitherto the case has been considered without reference to the point made upon the exclusion of the plaintiff's final offer of proof.

It remains to examine that point. Does it affirmatively appear from the bill of exceptions that the judge erred in refusing the offer? Unless it does the charge of error is not sustained.

In submitting propositions of proof it is requisite that counsel should be distinct and clear. A proposition should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled in the intended sense by the trial judge, and be examined and applied in the appellate court in the proper light to test the accuracy of the ruling if an adverse one.—*Clay Fire & Marine Ins. Co. v. Huron Salt, etc., Co.*, 31 Mich., 346, 356.

The object is to economize time by getting an admission of the facts or a ruling on their admissibility without the tedious process of examination, and the facts proposed ought to be indicated with sufficient clearness in regard to identity and sense to enable the court and adverse counsel to judge intelligently concerning their admissibility.

REYNOLDS v. CONTINENTAL INSURANCE CO.

Common fairness, as well as the nature of the proceeding, demand this.

If the judge is compelled to rule upon the offer he may possibly go beyond its obvious import and concede an intent not fairly indicated. This, however, is not to be intended. It must be clearly shown. He must be supposed to have passed upon the statement in view of what it actually seemed, and in case of exclusion, his decision, if correct when applied to the proposition as it appeared, cannot be questioned in an appellate court upon the claim of the party who made the offer, that the proposition covered some meaning which required a different ruling.

The ruling must be presumed to have been made on the proposition as it appeared, and not on it as it did not appear.

In *Daniels v. Patterson* the court had occasion to consider a question somewhat similar to the present, and *Judge Bronson*, who gave the opinion, observed: "We all know that offers of evidence are usually made in as broad and strong terms as the facts will warrant. Before a party excepts on account of the rejection of evidence he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fail to do so, and leave the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence, and if the meaning of the offer depends upon argument and inference, he must have much the best of the argument before a court of review should reverse the judgment."—3 *Comst.*, 47. See also *Elwell v. Dodge*, 33 *Barb.*, 336; *First Baptist Church v. Brooklyn Fire Ins.*, 23 *How. P. R.*, 448; *Johnson v. Carnley*, 6 *Seld.*, 570, 575, 576; *Pepin v. Lachenmeyer*, 45 *N. Y.*, 27; *Harger v. Edmunds*, 4 *Barb.*, 256; *Van Buren v. Wells*, 19 *Wend.*, 203; *Hosley v. Black*, 28 *N. Y.*, 438; *Wheeler v. Rice*, 8 *Cush.*, 205; *Weidler v. Farmers' Bank of Lancaster*, 11 *Sergt. & R.*, 134; *Wright v. DeGross*,

REYNOLDS v. CONTINENTAL INSURANCE CO.

14 Mich., 164; Gilbert v. Kennedy, 22 Mich., 117; Albright v. Cobb, 30 Mich., 355.

In the light of these considerations we may proceed to notice the terms of the plaintiff's proposition and in connection with the course of proceeding. After repeated rulings, which were well warranted, that the alleged bargain with Kirchhofer could not be shown, for the reason that no evidence had been adduced of his power to bargain for plaintiff's risk, the plaintiff took the stand for the third time, and swore that there were other insurances and that the whole amount of premium for all was twelve hundred and fifty dollars; that he paid Kirchhofer for this insurance one hundred and thirty-five dollars, and that the money had not been returned; that he did not know to which of the companies Kirchhofer applied it, and that he might have applied it to this company and might have applied it to some other. Plaintiff's counsel then said: "We now offer to prove by the witness the other facts alleged in the declaration, not proposing to offer any other evidence on the subject of agency, but the other facts to entitle us to recover three thousand dollars, with interest from the fourth day of August, 1874, the day of the fire; that they received the money for this loss and kept it." The judge then observed: "It is not necessary to take up time. I think the ruling before made should govern, if that is all the evidence." Plaintiff's counsel replied: "That is all on the subject of agency." "It is conceded that the other proof is made." The judge responded: "It has been offered once before, and I think it may be governed by the ruling before made." And counsel rejoined: "We offer to prove the other facts to entitle us to recover." Whereupon the judge answered: "It is objected to and the objection is sustained." Plaintiff's counsel thereupon excepted.

The charge of error is, that the court refused to allow the plaintiff to prove that the insurance company received this money for this loss and kept it, and hence ratified the bargain alleged to have been made with Kirchhofer. It

REYNOLDS v. CONTINENTAL INSURANCE CO.

will be noticed, in passing, that although the judge clearly indicated how his mind was directed by the general and ambiguous statements of plaintiff's counsel, and that he regarded them as only amounting to reassertion of claims and theories ruled previously, and not to an offer to adduce facts to make out a case in some other way or on some other theory, still the plaintiff acquiesced in the judge's construction and made no attempt to correct his impression if not right. The charge of error supposes the offer to have meant something else, and that the judge mistook in his understanding of it. There is high authority for saying that the plaintiff cannot question the correctness of the judge's construction, for the reason that it was virtually assented to at the trial.—*Morrish v. Murrey*, 13 *Mess. & Wels.*, 52; *Boeklen v. Hardenbergh*, 60 *N. Y.*, 8. But the point need not be disposed of on this principle. .

An examination of the course taken at the trial and of the proposition make it very apparent in the first place that the judge did not understand the offer in the sense now sought to be imposed on it by the plaintiff, and in the second place that there is no solid ground for considering that it was fairly open to any such meaning.

The main part of it was a proposal in so many words to make out the case set forth.

The declaration had already made this proffer, and in better form. An offer of particulars was required upon which some judgment could be formed.

No hint was given of any ratification, and all further proof relating to agency was disclaimed.

Again, the whole of the evidence suggested was to be made by the plaintiff himself. This was expressly stated. Nothing was proposed from any other source. The offer was distinctly confined to testimony by the plaintiff. And yet, he had just sworn that he knew nothing as to whether the insurance company had or had not received the money paid to Kirchhofer. Indeed, the offer did not propose in terms to prove that the company had received the money. As worded,

REYNOLDS V. CONTINENTAL INSURANCE CO.

the proposition was not distinctly unequivocal. It was capable of being so construed as to be consistent with the fact the plaintiff had sworn to, that the agent, Kirchhofer, had received it; but it could not be very well reconciled with the notion that the plaintiff would swear that the company had received it. Certainly the court could not be expected to understand from the language that plaintiff's counsel proposed to show by the plaintiff, in plain contradiction to what he had distinctly sworn to only a moment previous, that as matter of fact the corporation actually received the money. There was no intimation that the plaintiff had testified under a mistake or that any error had been committed. Considered as an offer of proof, the statement was insufficient, blind and indefinite, and in view of all the circumstances, it would have been remarkable if the judge had accepted it as having the sense and drift now imputed to it on the part of the plaintiff.

As represented in the record, and as it must have looked at the trial, it was natural for the judge to view it rather as a compendious reassertion of positions already ruled, than as a regular offer of proof of facts to make out a case, and there is some reason for thinking that the construction now claimed by the plaintiff for the proceeding was not thought of at the trial at all.

This charge of error must be overruled.

Finally, it is considered clear that no case for the jury was made, and that the judge did not err in directing a verdict for defendant. Had the plaintiff purposed to sue in equity to enforce performance of the alleged agreement, his want of material facts to enable him to set forth a *prima facie* provable agreement against the company on the basis, either of an original authority in Kirchhofer, a subsequent ratification, or matter of estoppel, would have been very conspicuous to him.

The judgment should be affirmed, with costs.

The other Justices concurred.

BOWEN v. SCHOOL DISTRICT NO. 9, ETC.

Cyrus H. Bowen v. School District No. 9 of Rutland.

School district order: Used as money: Implied promise: Waiving tort and bringing assumpsit. Where one who has wrongfully procured a school district order, has afterwards used it as money, the law raises an implied promise to pay the amount, and the tort may be waived and assumpsit brought.

Agency: Admissions: Evidence. Admissions of an agent, made after the fact, and entirely unconnected with any act of agency, are not evidence of the fact.

Agency: Evidence: Clerk: Payment: Authority: Admissions. Proof that a person is clerk for another, does not establish his right to receive for his employer payment of demands not shown to have any connection with the business; and evidence simply that payment was made to such clerk of such demands, is not a sufficient showing of agency to receive the same, to authorize evidence of admissions by such clerk of the payment thereof to him.

Interest: Trifling sum. The objection that the judgment embraced more interest than was allowable, is not considered, the difference being so trifling as to be insignificant.

Heard and decided April 5.

Error to Barry Circuit.

Harvey Wright, for plaintiff in error.

C. G. Holbrook, for defendant in error, was stopped by the court.

PER CURIAM:

The plaintiff below recovered judgment for the amount of a school district order and the interest thereon; defendant having, as the referee found, wrongfully procured the order as a substitute for a certain Goodyear order, which he untruly claimed to have paid and then lost, and having afterwards used it as money in the payment of his taxes. The recovery was on the common counts in assumpsit.

It is objected that an action in tort should have been brought, and not assumpsit. But as the defendant made use of the order as money, the law will raise an implied promise to pay the amount. The district perhaps might have sued in tort, but was not compellable to do so.

BOWEN v. SCHOOL DISTRICT NO. 9, ETC.

It is also objected that the court excluded the evidence offered to show an admission by Goodyear's clerk that the prior order was in fact paid by defendant to such clerk. The admission is relied upon as an admission made by an agent in the course of his agency. The evidence of the clerk's agency consists in the showing that payment was made to him, which he denies. The admissions sought to be shown were made afterwards, if at all, and were entirely unconnected with any act of agency. On this ground they were inadmissible. But they were also objectionable on the ground that they would only go to establish the actual existence of an agency by showing that an act as agent was in fact done; in other words, the fact which is to authorize the reception of admissions is to be proved by the admissions themselves. For to show that one man is clerk for another certainly does not establish his right to receive for his employer payment of demands not shown to have any connection with the business.

It is also claimed that the judgment below embraced more interest than was allowable. We find the difference insignificant, and are not disposed to inquire too nicely into it.

The judgment must be affirmed, with costs.

Austin B. Webber v. Robert Howe and another.

Prohibitory liquor law: Order for liquors: Shipment from Ohio: Michigan contract. Where an order for liquors is taken in this state by the vendor in person, and the goods are afterward shipped from Ohio and delivered to the vendee here, the contract is a Michigan contract; and whether the contract of sale be executory, or actually completed by delivery, it is equally invalid under the Michigan liquor law (*Comp. L., § 2137*), which declared void not only all sales, but all contracts or agreements relating thereto.

WEBBER v. HOWE.

Oral order for liquors: Void under statute of frauds: Ratification: Acceptance. The circumstance that the original order was an oral one and void under the statute of frauds, could not operate to make the transaction an Ohio contract; for, if void originally, it would not become binding upon the purchaser until he did something in ratification of it, as by accepting the goods. His void order could not make any carrier to whom the vendor should see fit to deliver the goods his agent.

Prohibitory liquor law: Repealing act: Previous unlawful sales. The prohibitory liquor law having expressly declared contracts the consideration for which in whole or in part was the sale of liquors utterly null and void, and provided that all moneys and securities received on such sales should be treated as received without consideration, and that they might be recovered back, a sale made in violation of this statute while it was in force is not validated by a subsequent repeal of the statute, "saving all actions pending and all causes of action which have accrued." Such a repealing law, instead of indicating the purpose to validate prior unlawful sales, indicates the contrary purpose.

Set-off: Moneys paid for liquors: Unlawful sales. A defendant may recover by way of set-off for moneys previously paid by him to the plaintiff for liquors, and which moneys, according to the law then in force, were paid without consideration.

Payment: Evidence: Orders. And proof of the payment by the defendant of orders drawn by the plaintiffs upon him in favor of third persons for such liquors, would be sufficient proof of payment to the plaintiffs; such payment is in law a payment to the plaintiffs themselves.

Heard January 11. Decided April 10.

Error to Wayne Circuit.

This was an action brought by defendants in error upon an acceptance by plaintiff in error of a draft drawn on him by them. The defense was that the consideration was the unlawful sale of liquors; and a set-off was pleaded of moneys paid by defendant to plaintiffs on previous unlawful sales of liquors. The judgment below was in favor of the plaintiffs.

John C. Howland and Maybury & Conely, for plaintiff in error, argued that the acceptance sued upon was void by reason of its having been given in consideration of an unlawful sale of liquors; that this turned on the question whether the transaction was a Michigan or an Ohio contract. The original order was taken and accepted in Michigan, and there is not a single circumstance disclosed which may be said to have happened between the parties in the state of Ohio. Every thing between these contracting parties, from the opening to the conclusion, began and ended in Michigan. The consideration of the acceptance was therefore illegal under the statute: *Comp. L. 1871, § 2137*. The circumstance that the original order was void under the statute of frauds because not in

WEBBER v. HOWE.

writing could not avail the plaintiffs; it could in no manner aid them that the contract was void for two reasons, instead of one only. The argument that there was no contract between the parties, and plaintiffs were therefore under no obligation to send the liquors, but that having done so it amounted to a ratification in Ohio of the acts of the parties and constituted an Ohio contract, would apply equally well to this case without as with the statute of frauds, and the effect would be that it would make no difference whether foreign liquor dealers came into the state or stayed out of it, for they could recover alike in either event. This reasoning ignores the fact that if plaintiffs were not bound by the transaction, neither was defendant. If they were under no obligation to ship, he was under none to accept. Mere delivery is not enough. There must be acceptance. Defendant having the right to accept or reject, his acceptance in Michigan makes the agreement a Michigan contract.

The defendant's claim of set-off was based upon another feature of the same statute. The evidence showed that the money had been paid for liquors and that the sales thereof were unlawful, and it should have been submitted to the jury.

The plaintiffs contended that the evidence did not go far enough to prove payment. We submit that when plaintiffs made their drafts on defendant for the bill of liquors, and in their drafts directed him to pay to their own order and charge the payments to their account, and endorsed the drafts, and the drafts came to Detroit and were paid and taken up by defendant, and he produced all the vouchers, he was not bound to go further and show that the party who presented the drafts here and received the money on them sent it forward to plaintiffs, any more than if any agent of plaintiffs had presented the bill to defendant and he had paid it, he would be bound to show that the agent had paid over his collections to his principal. When a man draws on another through any of the various financial channels, whoever presents the draft for acceptance or payment is *quo ad hoc* the agent of the drawer, and payment to him is payment to the principal.

Griffin & Dickinson, for defendants in error.

We submit that the defense sought to be maintained by the defendant below, in this cause, is not open to him since the repeal of the statute.

The repealing act (No. 228, S. L. 1875, p. 274) saves "all actions pending, and all causes of action which have accrued at the time the act takes effect," which was May 3, 1875.

WEBBER v. HOWE.

Now, it is true that if defendant had paid for the liquors at the date of the invoice, September 14, 1874, he would have then had a right of action—cause of action—which would have been saved by the statute.

But it does not follow from this that he has any defense at this time under the statute. How can he invoke the statute in his defense, when there is no statute?

A good test of the matter is this: Suppose defendant had paid for the liquors subsequent to May 3, 1875, it seems quite clear to us that he could not recover back the money paid. It seems also clear to us that the right of defense only co-exists with the right of the recovery back of the money.

Again, the act to prevent the manufacture and sale of spirituous liquors as a beverage, is clearly in the nature of a penal statute, and no penalty provided by it can be enforced without a saving clause in the repealing statute.

They will not be enforced by this court: *Engle v. Shurts*, 1 Mich., 150; *Railroad Co. v. Austin*, 21 Mich., 390, and cases cited.

We think the court was right in the matter of set-off. It has not been shown that plaintiffs below had received any money on the drafts. The drafts would not be evidence of this.

But if the drafts would be evidence ordinarily, they certainly would not be in this case. The drafts were either valid or invalid. If they were valid, of course the set-off could not be allowed. If they were invalid, they are not evidence for defendant.

In other words, defendant cannot pay a draft which is conceded to be illegal and void, and of no force or validity in the hands of the drawer, and then present this illegal and void instrument as evidence of such payment.

Under such circumstances the law does not presume payment of any money to the use of the plaintiffs below, for the reason that the plaintiffs below could not recover any money upon it. This case is within *Buckley v. Saxe*, 10 Mich., 328.

We submit also that the charge of the court was correct, viz.:

"If you find that the order, although taken in Michigan, was filled in Ohio, and the liquors were shipped in Ohio, and the defendant received them in Detroit and paid the freight, then the plaintiffs are entitled to recover."

The order in this case was given in Michigan, but was acted upon in Ohio, and the contract was consummated there, and became valid there: *Wilson v. Stratton*, 47 Me., 120.

WEBBER v. HOWE.

If this position is correct, it applies to the case of set-off, and as the jury found against the defendant below, the ruling in regard to set-off, if erroneous, did not affect the defendant below injuriously.

COOLEY, CH. J.:

The circuit judge charged the jury that if the order for the liquors, though taken in Michigan, was filled in Ohio, and the liquors were shipped in Ohio, and the defendant received them in Detroit and paid the freight, then the plaintiff would be entitled to recover. This instruction must assume that the contract was an Ohio contract, being completed by the acceptance and filling of the order in that state. Had the order been sent from this state to dealers in Ohio and filled there, or had an agent of the Ohio parties who had no authority to agree upon sales taken the order in this state and transmitted it to his principals, who accepted and filled it, we think the instruction might have been sustained.—*McIntyre v. Parks*, 3 Met., 207; *Orcutt v. Nelson*, 1 Gray, 536; *Garland v. Lane*, 46 N. H., 245; *Kling v. Fries*, 33 Mich., 275. But the order was taken here by one of the plaintiffs in person, and the acceptance, as well as the giving of it, took place in this state. There are some cases which have decided that even under such circumstances the sale is not completed until the property is actually separated from the stock in the store and delivered to the carrier in pursuance of the order.—*Sortwell v. Hughes*, 1 Curt. C. C., 244; *Abberger v. Marrin*, 102 Mass., 70; *Dolan v. Green*, 110 Mass., 322. But these cases are not important here, since whether the contract of sale was executory or actually completed by delivery, it was equally invalid under our statute. The statute not only avoided all sales, but “all contracts or agreements relating thereto.”—*Comp. L.*, § 2137.

It was suggested on the argument that, as the agreement was for the purchase of goods to the amount of more than fifty dollars, it was void under the statute of frauds for

WEBBER v. HOWE.

want of writing, and consequently did not take effect as an agreement until acted upon by the delivery of the goods to a carrier in Ohio. But if we assume the original invalidity of the agreement in this state on this ground, it cannot, we think, help the vendors. If void originally it would not become binding upon the purchaser until he should do something in ratification of it, and it does not appear that any thing further was done by him until the liquors were received in this state. His void order could not make any carrier to whom the vendors should see fit to deliver the goods his agent. The case must therefore stand either upon the original order or upon the reception of the goods at Detroit under it; and in either case the contract must be regarded as a Michigan contract.—*Hanson v. Armitage*, 5 B. & Ald., 557; *Acebal v. Levy*, 10 Bing., 376; *Morton v. Tibbett*, 15 Ad. & El., 428; *Bushell v. Wheeler*, 15 Q. B., 442; *Norman v. Phillips*, 14 M. & W., 277; *Farina v. Home*, 16 M. & W., 119; *Outwater v. Dodge*, 6 Wend., 400; *Lloyd v. Wright*, 25 Ga., 215; *Spencer v. Hale*, 30 Vt., 314; *O'Neill v. N. Y. C. & H. R. R. Co.*, 68 N. Y., 138; *Shepherd v. Pressey*, 32 N. H., 49; *Hart v. Bush*, El. & El., 492; *Curry v. Anderson*, 2 El. & El., 592. Had this suit, therefore, been brought while the statute which forbade such contracts remained in force, there could be no question but the plaintiffs must fail.

That statute, however, has been repealed, and the plaintiffs rely upon the repeal as taking away all impediment to a recovery. It was, it is said, in the nature of a penal statute, and when it was repealed, all penal consequences, including the inhibition to maintain suits for liquors sold, fell with it.—*Engle v. Shurts*, 1 Mich., 150; *Welch v. Wadsworth*, 30 Conn., 149; *Confiscation Cases*, 7 Wall., 454.

The prohibitory liquor law expressly made all contracts the consideration for which in whole or in part was the sale of liquors utterly null and void, except in certain specified cases, of which this was not one. It also declared

WEBBER v. HOWE.

all moneys and securities received on such sales to be received without consideration, and authorized them to be recovered back.—*Comp. L. 1871, ch. 69*. While this was in force, the sale in question was made. The law was repealed in 1875, “saving all actions pending and all causes of action which have accrued” at the time the repealing act took effect.—*Public Laws 1875, p. 279, 280*.

It has often been decided that a contract invalid at the time it was made for want of compliance with some statutory provision, or because of some statutory prohibition, might be validated by legislation afterwards.—*Lewis v. McElwain, 16 Ohio, 347; Savings Bank v. Allen, 28 Conn., 97; Andrews v. Russell, 7 Blackf., 474; Parmelee v. Lawrence, 48 Ill., 331; Dulany's Lessee v. Tilghman, 6 G. & J., 461; Journeay v. Gibson, 56 Penn. St., 57; Carpenter v. Pennsylvania, 17 How., 456; Dentzel v. Waldie, 30 Cal., 138; Estate of Sticknoth, 7 Nev., 227; Gibson v. Hibbard, 13 Mich., 215*. But this case is not like those referred to. Here the statute has not undertaken to validate the void agreement, but has left it as it was, “utterly null and void.” A suit cannot be brought upon it, because no contract ever existed. The repealing law, instead of indicating a purpose to validate such agreements, indicates the contrary purpose.

It only remains to consider a claim made by defendant to recover by way of set-off for moneys previously paid by him for liquors, and which, according to the law then in force, were paid without consideration. We have no doubt of his right to set off these moneys if he proved the payment. This he claims to have shown by proving the payment by him of orders drawn by the plaintiffs in favor of third persons. We cannot see why this proof is not complete. Plaintiffs relied upon *Buckley v. Saxe, 10 Mich., 328*, but that case was quite different. There to prove that he had paid money on a bet, the plaintiff produced a note he had given for the sum bet; and this alone, it was held, did not prove the payment of money on the bet.

WEBBER v. HOWE.

Here the payment is proved, and as it was made on the drafts drawn by the plaintiffs on the defendant, it was in law a payment to the plaintiffs themselves.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Sarah Heyman v. Leonard Covell.

Plea in abatement: Replevin: U. S. marshal: Execution: Demurrer. A plea in abatement in a replevin suit, that the defendant took the goods as deputy United States marshal on an execution issued out of the United States circuit court against a third person named, which fails to aver that the execution was issued on any judgment, or that any judgment had been obtained against either the plaintiff in replevin or the defendant in the execution, or that the property had been levied upon as belonging to the defendant in execution, is held bad on demurrer.

Execution: Property of stranger: U. S. courts: Jurisdiction: Judgment. The seizure on execution from a federal court, of property of a stranger to the writ, will not operate to bring the property within the exclusive jurisdiction and control of the United States court, at least not in the absence of any judgment to support it.

Executions: Taking property of third person: Trespass: Judgment: Forum. The taking by virtue of an execution of property not belonging to the execution debtor, is tortious and a trespass, though the writ be a valid one; and a seizure upon a writ issued without any judgment or order of the court to support it, could have no force in fixing the forum for determining the right of property.

Plea in abatement: Jurisdiction. A plea in abatement to the jurisdiction must always show another forum where the rights have already become subject to judicial authority. It must also be certain according to the most rigid rules of precision.

Heard January 12. Decided April 10.

Error to Kent Circuit.

Norris & Uhl, for plaintiff in error.

E. W. Butterfield, for defendant in error.

HEYMAN v. COVELL.

CAMPBELL, J:

Plaintiff having commenced a suit in replevin in the circuit court for Kent county, defendant pleaded in abatement that he took the goods as deputy marshal under an execution issued out of the circuit court of the United States for the western district of Michigan, in favor of James McLean and Henry H. Statesbury against Adolph Heyman.

To this plea a demurrer was put in, but overruled, and judgment entered that defendant was not guilty and that the property be returned to defendant. The form of this judgment is the same used when the merits have been tried, but this need not be considered.

It is not averred that this execution was issued on any judgment, or that any judgment against either Adolph or Sarah Heyman had been rendered. Neither is it averred that the property was levied on as belonging to Adolph Heyman.

Without discussing at length how far under the practice governing the procedure of the courts of the United States sitting within this state, any inquiry could be made in aid of the plaintiff which would come within the constitutional right of persons whose property has been taken by a plain trespass not to be deprived of due process of law for its recovery, we do not think any case is made by this plea.

While most of the decisions of the United States supreme court bearing upon the immunity of property held under one jurisdiction from seizure by another, have arisen under very different circumstances from the present, and while, though there are some *dicta*, there is no decision, so far as we know, which holds that the property of strangers to a final execution is brought by seizure under it within the exclusive control of the courts of the United States, we find no decision or *dictum* which would maintain any such doctrine in the absence of a judgment.

The whole question has been made to turn on the fact that a court had possession of the property because its juris-

HEYMAN v. COVELL.

diction had attached in a cause in which the process was issued. Although there may be no liability for trespass against an officer who honestly takes property under a process apparently valid in form, no one has ever imagined that such a seizure could affect the condition of the property for any purpose, if supported by no record or proceedings in court. And where property is taken which is not that of the execution debtor, the taking is necessarily tortious and is always a trespass.—*Buck v. Colbath*, 3 Wal., 334. It was held in that case that a seizure under a good writ against the wrong person did not draw into the federal court the determination of title to the property against a stranger to the writ, and that the court could grant the officer no protection against the consequences of his own wrongful act. And it would be absurd to hold that where a writ never issued under any judgment or order of the court at all, the court could take any more notice of the right of property than if it had been seized without a writ.

A plea in abatement to the jurisdiction must always show another forum where the rights have already become subject to judicial authority.—*Watson v. Jones*, 13 Wal., 679.

It must also be certain according to the most rigid rules of precision.—*Wales v. Jones*, 1 Mich., 254; *Belden v. Laing*, 8 Mich. R., 500. The omission here is neither formal nor technical, but substantial, and the plea fails to show any ground of abatement.

If the defendant should show a valid judgment upon a trial on the merits, the other questions argued will come up for decision, and may then be disposed of.

The judgment must be reversed, with costs, and the demurrer sustained, the defendant to answer over according to the usual practice.

The other Justices concurred.

WILCOX v. ALLEN.

Sextus N. Wilcox and others v. Asa M. Allen and
others; and The Lumberman's National
Bank of Muskegon v. Sextus
N. Wilcox and others.

Mortgages: Notes: Interest: Payment: Saw-bill. Upon the sale of certain saw-mill property and pine-lands, the purchaser having given for part of the purchase price his five promissory notes of eleven thousand dollars each, payable one in each year for five successive years, with interest payable semi-annually, secured by mortgage on the property, and the contract of purchase providing that the vendors should furnish to the purchaser, to be sawed at the mill, fifty-five million feet of saw-logs in quantities of eleven million feet per annum, and to pay him for sawing the same, and that one dollar per thousand feet of the saw-bill was to be retained by the vendors and applied each season in payment of the principal of the note then next maturing, it was held, that it was the evident intent of the parties, as expressed in their agreement, that the one dollar per thousand feet thus reserved from the saw-bill of each eleven million feet should be in full satisfaction of the note then next maturing, and that the note should not bear interest during that year, if paid in sawing in this manner; the payments for sawing beginning on May 1st, and continuing in monthly installments during the sawing season, which would close in October or early in November, and the notes not maturing till January, the average time of payment by means of the sawing would be nearly six months before the principal would become due according to the terms of the note.

Contracts: Several instruments: Single transaction: Construction. The contract of sale of the mill property and land, with the agreement to furnish the logs for sawing, and the notes and mortgage given for the purchase price, are all construed together as constituting but one transaction.

Contracts: Payment: Application: Saw-bill. The contract between the parties being afterwards modified so as to give the vendors the option to furnish fifteen million feet of logs during the first season, instead of eleven million, with the option to the vendee of applying any portion of the saw-bill of the additional four million feet of logs in payment of the purchase-price notes, it is held this agreement gave the mortgagor the option of applying the saw-bill of any additional logs delivered under the agreement in payment of any of the notes, and was broad enough to authorize its being applied by him in payment of either principal or interest upon any or all of the notes.

Contract construed: Manufacturing lumber: Scaling: Excess. The contract providing for the logs being scaled in the mill by a competent scaler whose appointment was provided for, and that the party doing the sawing was to deliver the same number of feet of merchantable lumber as would be equivalent, board measure, to the total scalage of the logs delivered, it is held that when he had complied with this provision he had delivered all he was bound to under the contract, and he was entitled to any excess.

WILCOX v. ALLEN.

Mortgages: Interest clause: Election to declare whole due: Dispute as to interest due. Under an interest clause in a mortgage, providing that upon default for more than sixty days in the payment of interest after it comes due, the whole principal should, at the option of the mortgagees, become immediately due and payable, it is held that where the mortgagor in good faith and upon reasonable grounds denied his liability to pay interest, or claimed that he had paid it, he could not by virtue of this clause be made liable to pay the whole principal at once, even though it should turn out, upon trial of the matter, that he was in error. This clause is in the nature of a forfeiture or penalty, its object being to punish for the willful neglect of a clear duty, and to hold it applicable to a case where there was an honest dispute, would be harsh and unjust, and contrary to equity.

Mortgages: Insurance collected: Payment. The mill having been insured and subsequently destroyed by fire, and the insurance transferred, according to agreement, to the mortgagees to be collected and applied as fast as collected in payment of the mortgage indebtedness, the insurance thus collected should be allowed as payment upon the mortgage.

Mortgages: Payment by saving: Mortgagees: Assignee: Insurance collected. The mortgagees having assigned the notes and mortgage to a trustee, in trust to pay certain indebtedness of theirs, under an arrangement that upon default on their part the notes and mortgage were to be sold and from the proceeds their debt and interest paid and the balance if any turned over to the assignors, and the beneficiary under such trust having full knowledge of the provisions as to payment by saving, and also of the agreement as to the insurance, and that the mortgagees were expected to collect the same, the assignee is held bound under the circumstances by the agreements and dealings in this regard between the mortgagor and the mortgagees.

Mortgages: Foreclosures: Assignment: Cross-bill. One of the several notes secured by the mortgage having been turned out by the mortgagees as collateral to an indebtedness of theirs to a party whose equities might turn out to be different from theirs, it was competent for such assignee to file a cross-bill; and the fact that his interests would be fully protected as defendant in the original cause in case the complainants therein prevailed, would be no ground for holding the cross-bill improperly filed, where in case the original bill were dismissed, the complainant in the cross-bill would thereby be deprived of the means of obtaining the relief to which he might be entitled.

Mortgages: Several notes: Priority. Where several notes of like date, but falling due at different times, are secured by one mortgage, it is error in a foreclosure decree to give priority to any of the notes.

Mortgages: Assignment as collateral: Cross-bill: Personal liability of assignors. Mortgagees having assigned as collateral to their indebtedness one of several notes secured by the mortgage, and having filed a bill to foreclose the mortgage, and their assignee having thereupon filed a cross-bill to protect his interests, it is competent on such cross-bill to render a decree holding said mortgagees personally liable to their assignee for any deficiency, though they have not made themselves liable upon the note as endorsers or otherwise, they being liable to him upon the original indebtedness sought to be recovered.

Heard January 12. Decided April 10.

Appeal in Chancery from Muskegon Circuit.

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WILCOX v. ALLEN.

Hughes, O'Brien & Smiley, for complainants.

Smith, Nims & Erwin, for defendants.

MARSTON, J:

Theodore B. Wilcox, Albert B. Wilcox, L. C. Paine Freer and Sextus N. Wilcox, filed a bill to foreclose a mortgage executed by Asa M. Allen and dated November 22, 1872, which was given to secure, amongst other things, the payment of certain promissory notes executed by the latter to T. B. Wilcox & Co., in accordance with the terms of an agreement of even date therewith, by which Wilcox & Co. sold certain mill and other property in Muskegon to Allen. T. B. Wilcox & Co., being indebted to Sextus N. Wilcox, upon the same day, November 22d, assigned certain of these notes and the mortgage to Freer in trust to secure the payment of their indebtedness to Sextus N. Wilcox.

Although the bill of complaint sets forth and alleges that complainants sustained and are entitled to damages because of non-performance and violation of the covenants and agreements contained in the contract for sawing, yet, as we understood counsel on the argument, and as set forth in their brief, this portion of the case is not insisted upon, complainants resting their case upon defendant's default in not paying interest upon the notes according to the terms thereof, the effect of which was, under a clause in the mortgage, to render the entire debt due at the option of the mortgagees.

The contract of sale of the lands, the notes and the mortgage are of even date, November 22, 1872, and all constituted but one transaction.

Theodore B. Wilcox and Albert B. Wilcox, composing the firm of T. B. Wilcox & Co., of the first part, and Asa M. Allen, of the second part, upon the 22d day of November executed a written agreement, by which the first parties sold and agreed to deliver to the second party their certain mill property at Muskegon with other property. After the

WILCOX v. ALLEN.

formal parts and description of the property sold, the contract proceeds as follows:

“And whereas, the sale price of said entire property was the sum of sixty-five thousand dollars, the payment of fifty-five thousand dollars of which sum is to be paid in five installments of eleven thousand dollars each, evidenced by five promissory notes for said respective sums, dated of even date herewith, and payable to the order of T. B. Wilcox & Co. on the first day of January of each of the years A. D. 1874, A. D. 1875, A. D. 1876, A. D. 1877, and A. D. 1878, at the banking office of Lunt, Preston & Kean, in said Chicago, with interest at and after the rate of seven per cent. per annum, payable semi-annually, the interest beginning to run on the first day of January, A. D. 1873: Now, said parties of the first part, in consideration of the covenants and considerations hereinafter specified to be kept and performed by said party of the second part, agree and covenant to and with said party of the second part, his executors and administrators, to deliver at the boom of the above specified mill fifty-five millions of feet of merchantable pine saw-logs in quantities of eleven millions of feet per annum, and beginning to deliver the same as soon as the Muskegon Booming Company shall begin operations in the spring of the year, A. D. 1873, and annually thereafter, and to continue to deliver the same through the seasons of each year, beginning with A. D. 1873, as aforesaid, as fast as the said booming company shall or may assort, raft and tow the same.

“And said parties of the first part, in consideration of the premises recited, agree to and with said second party to pay him for sawing said lumber as follows: For the first year's operations at and after the rate of three dollars and fifty cents for each thousand feet, board measure; two dollars and fifty cents, board measure, on each thousand feet, to be paid at Muskegon, on the first day of each month during the sawing season, beginning on May 1st, A. D. 1873, such payments to be made on the amount of lumber shipped as shown by the certificate of inspection, or in case

WILCOX v. ALLEN.

said lumber shall be piled along said switch track there upon the certificate of measurement by the measurer agreed upon by the parties as above provided.

“And as to the remaining one dollar per thousand feet of lumber sawed, the same shall be retained by said first parties and be applied by them on the first of the notes so as aforesaid to be given by said second party, then next maturing.

“And for each of the remaining years’ business under this contract, and for sawing and piling, as aforesaid, said parties of the first part agree to pay to said second party from year to year, in equal monthly installments, as above provided, and at the place aforesaid, the average market price for manufacturing on Muskegon lake, reserving, however, in each year, at the rate of one dollar per thousand feet, the same to be applied in the payment of the principal sum of any of said notes due or then next maturing.

“And it is further agreed that at the end of each sawing season, under this contract, if the sum of one dollar per thousand feet, so to be reserved, shall have been more than sufficient to pay the principal of the note falling due for the current year, the excess shall be paid to said second party on demand.”

The notes are in the usual negotiable form, “with interest at seven per cent., payable semi-annually.”

The mortgage is given to secure the payment of sixty-five thousand dollars, the balance of the purchase price of the lands, evidenced by five promissory notes, each in the sum of eleven thousand dollars, and falling due respectively on the first days of January in each of the years 1874, 1875, 1876, 1877, and 1878, “and drawing interest from and after the first day of January, A. D. 1873, at and after the rate of seven per cent. per annum, payable semi-annually.” There was another note secured by this mortgage, given for the sum of ten thousand dollars, payable January 1, 1873, without interest.

On the 20th day of January, 1873, there was a written

WILCOX v. ALLEN.

modification or addition to the contract of November 22d, that portion thereof bearing upon this question being as follows:

"Now this is to certify that in case said first party shall elect on or before May 1, 1873, to deliver to said second party fifteen million (15,000,000) feet of logs instead of eleven million (11,000,000) feet as provided in the contract above mentioned, then and in that case the said second party hereby agrees to saw such additional four million (4,000,000) feet in all respects on the same terms, conditions, price, etc., as provided in said contract for the sawing of the eleven million (11,000,000) feet before mentioned, with the exception that said second party shall have the option of applying any portion of the saw-bill of the said additional four million (4,000,000) feet of logs on the payment of the mill notes due by said second party to said first party on the first day of January of each of the years 1874, 1875, 1876, 1877 and 1878."

Other modifications and changes were made, but they need not here be noticed.

We do not deem it necessary at present to make a careful examination of the accounts existing between these parties, for the purpose of ascertaining the exact indebtedness at the time the bill was filed. An examination and settlement of the legal questions in dispute between them will, we think, be all that will be required in the present controversy.

I. According to the express terms of the contract, also of the notes and mortgage, interest was to be paid upon the notes semi-annually, and we find nothing in any of these papers inconsistent with the clearly expressed agreements, except as next noticed.

II. The contract specifically points out the time and manner in which these notes were to be paid. The mortgages were to deliver at the mill-boom fifty-five million feet of merchantable pine saw-logs in quantities of eleven million feet per annum, the first to be delivered in the

WILCOX v. ALLEN.

spring of 1873, and to be delivered annually thereafter. These logs were to be received by the mortgagor and manufactured into lumber at this, his mill, and he was to receive for manufacturing, piling, etc., for the first year at the rate of three dollars and fifty cents per thousand, and for each of the remaining years the average market price for manufacturing on Muskegon lake. The mortgagees were to pay a certain portion of the price so agreed upon for manufacturing in equal monthly installments, and the contract provided how the quantity should for this purpose be ascertained. In each year one dollar per thousand was to be reserved by the mortgagees and to be by them applied upon the notes then due or next maturing, and if the amount so reserved should be more than sufficient to pay the note falling due for the current year, the excess was to be paid to the mortgagor on demand. We think the evident intent of the parties, as expressed in this agreement, was, that the one dollar per thousand reserved upon eleven million feet, would be in full satisfaction of the note then next maturing; that the note during that year should not, if paid in sawing, draw interest. The parties in thus providing that eleven thousand dollars should be reserved and be applied in the payment of the principal sum, meant thereby to exclude all idea of the payment of interest. The parties in contracting, the one to deliver and the other to saw, fifty-five millions of feet of merchantable pine saw-logs in quantities of eleven million feet per annum, undoubtedly intended that the one dollar reserved upon this quantity each year would satisfy and pay in full the note then next due, and as these logs were to be delivered in the boom, and scaled in the mill by a competent person, which would be the first opportunity afforded for ascertaining the exact quantity delivered in any one season, it is a reasonable presumption that the parties supposed the quantity delivered might over-run eleven million feet, and be sawed during that year. They therefore, to meet this state of things, provided that if the sum so reserved should be more than

WILCOX v. ALLEN.

sufficient "to pay the principal of the note falling due for the current year, the excess should be paid to said second party on demand." If interest was to be paid, we can see no object in requiring the excess to be thus paid on demand to the mortgagor by the mortgagees, if the latter was at the same time entitled to demand and receive back interest for the current year upon the note, the principal of which had been paid.

There is still another reason for coming to the same conclusion. Eleven million feet of logs were to be sawed each year, the saw-bill was to be paid by the mortgagees at Muskegon on the first day of each month during the sawing season, beginning on May 1st, less one dollar per thousand feet, which was to be retained by the mortgagees "and be applied by them on the first of the notes so as aforesaid to be given by said second party, then next maturing." In accordance with this provision of the contract, payments would be made upon the notes nine months before the principal became due, and two months before the semi-annual interest would be payable, if interest was to be paid, and as the sawing season would close in October or early in November, the entire note would be paid before it became due. This the parties must have taken into consideration, and as the average time of payment would be nearly six months before the principal would become due, they agreed that payment of the principal should be in full satisfaction of the note, and such, we think, is the fair legal construction of their agreement.

III. As to the interest upon notes not thus maturing and being paid, whatever the rule might have been under the contract of November 22d, we think the agreement of January 20, 1873, clearly gave the mortgagor the option of applying any portion of the saw-bill of any additional logs delivered under that agreement, in payment of any of the notes given. This agreement is certainly broad enough to authorize the payment of either principal or interest upon any or all of said notes.

WILCOX v. ALLEN.

IV. It appears that the scale of the manufactured lumber exceeded the log scale. Defendant Allen claims that he is entitled to retain as his own property any such excess of lumber, and that where a portion of such excess has been delivered to or received by the mortgagees, the value thereof should be credited him upon any balance found due upon these notes. The mortgagees deny Allen's right to any such excess. We held in *Wilcox et al. v. Allen*, *January Term, 1876*, that under this contract Allen was entitled to all such excess lumber, and we have as yet seen no reason for changing the conclusion then arrived at. The logs were to be scaled in the mill by a competent person, and the parties were very particular in providing how such party should be chosen in case they could not themselves agree upon a scaler. And Allen agreed to deliver to said first parties, T. B. Wilcox & Co., in the manner specified, "the same number of feet of merchantable lumber as above specified, equivalent in the number of feet, board measure, to the total scalage of the logs to be delivered." When Allen had complied with this clause, he had delivered all he was bound to under this contract. Allen was entitled to the unmerchantable lumber and slabs, and did not, however, agree to deliver to them all the merchantable lumber manufactured from the logs, and that it should at least be equivalent in the number of feet to the total scalage of the logs to be delivered. It is not at all clear that this excess comes from the logs delivered. The evidence tends to show logs received into the boom from other sources and sawed in the mill, which would account in part or wholly for this excess.

V. The mill purchased by Allen from the mortgagees was destroyed by fire in June, 1874. There was an insurance at that time upon it of thirty-five thousand dollars. This insurance was, under an agreement made between Allen and T. B. Wilcox & Co. July 18, 1874, to be assigned to T. B. Wilcox & Co., who were diligently to prosecute and collect as far as practicable the amount thereof, and as fast as collected apply it in payment of this mortgage indebted-

WILCOX v. ALLEN.

ness. The policies were assigned and T. B. Wilcox & Co. collected upwards of twenty-five thousand dollars thereon previous to January, 1875. This money so collected should have been applied in payment of the mortgage indebtedness as the parties agreed, unless, as claimed, the rights of S. N. Wilcox would be affected thereby, which we shall notice hereafter. The liability of T. B. Wilcox & Co. for insurance assigned but not collected we do not decide, as the facts bearing thereon are not sufficiently before us.

VI. It is also claimed that the interest upon these notes having been unpaid, notice was given by the mortgagees in March, 1874, of their option to consider the whole amount of the notes, both principal and interest, due, under a clause in the mortgage providing that if any interest was due and remained unpaid for a period of sixty days thereafter, the whole of the principal sum evidenced by said notes should thereupon, at the option of the mortgagees, become immediately due; and the bill of complaint was filed in this case claiming the whole amount due upon this theory.

Whether any interest will be found to have been due at the time such notice was given, under the views we have expressed, we do not at present determine. We are all clearly of opinion that advantage can only be taken of a clause of this kind in a case where there can or ought to be no reasonable dispute between the parties as to the amount due and unpaid. Where the mortgagor in good faith and upon reasonable grounds denies his liability to pay interest, or if he is so liable, claims it to have been paid, he cannot thus be made liable, even although it should turn out that he was in error. This clause is in the nature of a forfeiture or penalty. Its object is to punish for a willful neglect of a clear duty, and to hold it applicable to and apply it in a case where there was an honest dispute, would be harsh and unjust, and contrary to all well settled equitable principles.

VII. Is Sextus N. Wilcox bound by the agreement and dealings between Allen and T. B. Wilcox & Co. and by the assignment of the insurance policies to the latter? The

WILCOX v. ALLEN.

assignment made by T. B. Wilcox & Co. of these notes and mortgage was to secure the payment of a certain indebtedness owing by them to Sextus N. Wilcox. In case of default on their part the trustee was authorized to sell the Asa M. Allen note and mortgage at public auction to the highest bidder, and from the proceeds of such sale to retain the amount owing him, with interest and costs, the balance, if any, to pay over to the assignors, T. B. Wilcox & Co. It is not claimed that Sextus N. Wilcox did not at the time of this assignment have full knowledge of the contents of the mortgage and contract of November 22d. He knew that these notes were to be paid by sawing to be done for the mortgagees, and that a clause was contained in the mortgage requiring the mill property to be insured, and in case of loss, that the mortgagees should be permitted to collect such insurance in their own name or in the name of the insured to their use, and that the amount so collected should apply upon the notes then matured, or then first maturing and remaining unpaid.

Sextus N. Wilcox was examined and testified that he knew of the destruction of the mill and of the amount of insurance thereon; that he had informed T. B. Wilcox & Co. he should look for his pay out of this insurance, and was by them informed that they did not control the insurance at that time, Mr. Allen not having assigned the policies. He also testified that he notified them "that as soon as the policies were assigned properly so that they could control them, that they should give me enough of the policies to pay the amount my due." He says he had no knowledge of the assignment at the time it was made, but testified: "I supposed the policies were in their hands (T. B. Wilcox & Co.) ready to transfer to me on demand up to the last hour. When I demanded the policies they turned over to me what policies they had then uncollected, which proved to be eleven thousand five hundred dollars, and the bulk of it is uncollected to-day. I was very much disappointed at the result and blamed them very much." When asked if

WILCOX v. ALLEN.

he had called them to account for what they had collected, his answer was: "I never have called on them; I have claimed that they did me an injustice in the matter and violated good faith, as I thought, to collect them without my knowledge." There is other evidence in the case bearing upon his knowledge of the assignment from Allen to T. B. Wilcox & Co., and of his want of such knowledge. We think the above is sufficient to show pretty clearly that he expected the policies would be assigned to them, and that he looked to them, in the first instance, and not to Allen, for the policies or their proceeds.

There is another somewhat important fact in this connection. The notice of default in the payment of interest, and election to consider the whole amount due, served upon Allen, is dated, or was served rather, on the 14th of March, 1874. It purports to have been signed for the mortgagees, trustees and Sextus N. Wilcox, by T. B. Wilcox, and requires payment of the entire mortgage debt to be made to Theodore B. Wilcox or Albert Wilcox. This was the only notice served. The bill was filed relying thereon, and the notice does not seem to have been at any time repudiated by any of the parties by whom it purports to have been signed. If this notice was given with authority, then payments or assignments made to T. B. Wilcox & Co. would bind all the parties thereto. From the evidence in this case, we are of opinion that the insurance should be applied as the parties agreed, and that Sextus N. Wilcox is bound by the acts of T. B. Wilcox & Co. in the premises.

VIII. It remains but to consider the questions raised upon the claim under the cross-bill. Complainants in the original bill insist that a cross-bill was not necessary; that the bank could have obtained full and complete relief in the original cause. This, perhaps, would be true if complainants in the original cause should succeed in obtaining a decree. If, however, they at any time had dismissed their bill, or the court upon the hearing had dismissed it, we do not well see how the bank (defendant in the original, and complainant

WILCOX v. ALLEN.

in the cross-bill) could have obtained a decree for the amount of its claim, no matter how clearly it may have been entitled to it. We think the bank was not obliged to run any such risks, and that the cross-bill was properly filed under the circumstances. The cross-bill was taken as confessed, and a decree rendered in favor of the bank for the amount of its claim, and giving it priority over the other notes secured by this mortgage. We are of opinion that such a decree should not have been granted—so far as it gives priority. There is nothing in this case to take it out of the general rule, as laid down in *English v. Carney*, 25 Mich., 178, and *McCurdy v. Clark*, 27 Mich., 445. A majority of the court are of opinion that the proceedings by the bank were for the purpose of collecting its indebtedness against Theodore B. and Albert Wilcox, and that although these parties may not be personally liable upon the note delivered by them to the bank, as endorsers or otherwise, yet they are liable upon the original indebtedness sought to be recovered.

We think, therefore, the case comes within the provisions of our statute, holding the Wilcoxes personally liable, and will tend to prevent multiplicity of suits.

As under the view we have taken of the legal questions in this case, there was not any thing due complainants in the original suit at the time their bill was filed, the decree dismissing it must be affirmed. The decree in the cross-bill will be modified as to priority, and as modified, be affirmed.

Defendant Allen to recover costs in original suit, and to be without costs to the other parties in either original or cross-bill.

The other Justices concurred.

SHEPARD v. SHEPARD.

Samuel C. Shepard v. Catharine L. Shepard and others.

Foreclosures: Bill of complaint: Description of premises: Mortgage: Variance. The fact that a foreclosure bill describes the premises mortgaged in different terms from those used in the mortgage itself, is of no consequence, where the mortgage is sufficiently identified and the premises described in the bill are substantially the same as those described in the mortgage. If either party desires a judicial settlement as to what precise parcels the description attached to, a proper case therefor should be made and be followed by the proper proof.

Answer: Annexing copy deed: Pleading: Evidence. The attaching to an answer of what is alleged to be a copy of a deed, upon which the defendant bases certain claims, operates only to amplify the pleading; and the deed is not thereby proved and made evidence in the case.

Plats: Lots and blocks: Evidence: Judicial notice. The court cannot take judicial notice of the relative situation of lots and blocks on a map or plat which is not introduced in evidence, or as to how they apply to the ground.

Mortgages: Mistake: Description of premises. A mortgagee who has received in good faith a mortgage executed by his debtor and his wife, of property the title to which of record was in the husband, is not liable to have his mortgage invalidated as to a portion of the premises, on a claim by the wife of the mortgagor that she held such portion by an unrecorded deed from her husband, and that the same was included in the mortgage by a mistake of her husband, for which mistake it is not claimed the mortgagee was in any wise responsible.

Mistake: Description of premises: Design to exclude certain lands. The law requires very strong proof to support a real charge of mistake in a deed, and it has never gone so far as to convict a mortgage of embracing lands which ought not to have been put in, although in a condition to be so mortgaged and deliberately included by the mortgagor himself, on the naked ground that the mortgagor swears he entertained a secret design to exclude such lands from the description.

Mortgages: Fraud: Conspiracy: Unrecorded deed. Where a father had deeded premises to his sons, which the latter had afterwards reconveyed to him for the purpose of enabling him to mortgage the same to secure a debt, and these facts were made known to the mortgagee at the time, a strong showing will be required to make out the defense on the father's testimony on behalf of his sons, that the property had been reconveyed to them by him prior to the mortgage by a deed which was not of record, and that the mortgagee was informed of this deed but conspired with the father to defraud his sons by taking the mortgage and placing it on record in advance of their deed.

Title: Notice: Blind remarks: Ambiguous hints. Blind remarks and ambiguous and misleading hints as to the state of the title, which were not understood by the mortgagee to have the meaning that is afterwards sought to be put upon them, are not very conclusive as a showing of notice of an unrecorded deed which is claimed to have been the result of a sudden change of plans of which the mortgagee had no notice.

Heard January 19. Decided April 10.

Appeal in Chancery from Clinton Circuit.

SHEPARD v. SHEPARD.

Spaulding & Cranson, for complainant. .

R. Strickland, for defendants.

GRAVES, J:

It appears from the case, that Alpheus F., William S. and George Shepard are sons of William Shepard; that Catherine L. is his wife, and that complainant is his nephew; that prior to and until some time after November 20, 1871, William Shepard and his son George Shepard and Jacob L. Button carried on business at Shepardsville, in Clinton county, as partners under the style of "W. & G. Shepard & Co.;" that the firm became indebted to complainant for money borrowed in something like two thousand two hundred dollars, and he insisted on payment or security; that the firm thereupon, and on the day before mentioned, gave him their promissory note for two thousand three hundred dollars, with interest at ten per cent., and William Shepard and his wife Catherine executed a mortgage to him as collateral security, which he put on record on the 27th of the same month.

This mortgage was wholly prepared by William Shepard, and nothing passed between Mrs. Shepard and complainant concerning it.

In March thereafter, and toward the latter part of that month, creditors proceeded against the firm in bankruptcy, and some time after September 12, 1874 (but the true time of which does not appear in the printed record), the complainant filed the present bill to foreclose the mortgage before mentioned.

Assuming to give the effect of the descriptive part of the mortgage, the bill claimed that the property was "all the south half of the southeast quarter of section nine, in township seven north, of range one west, Clinton county, Michigan, excepting lots six, ten, and eleven, in block eight, lots one, two, eight, fourteen, fifteen, sixteen and seventeen,

SHEPARD V. SHEPARD.

in block seven, and lots one and two, in block six, in the village of Shepardsville, Clinton county, Michigan; and also mill-lot number one, in block number three, with mills thereon, and lot number three, in block number two, with store thereon, in said village of Shepardsville, and being on the north half of southeast quarter of said section nine."

The bill set up, among other things, that subsequent to the mortgage, and on March 5, 1872, there had been placed on record what purported to be a deed dated some twenty days earlier than the mortgage, namely, November 1, 1871, from the mortgagors to the sons, Alpheus and William S. Shepard, for all the south half of the southeast quarter of section nine, township seven north, range one west, excepting the part platted in the village of Shepardsville, the same being a part of the premises apparently mortgaged, and complainant alleged that he had no knowledge of this grant when he took the mortgage, and further, that it had not been delivered at that time.

The assignee in bankruptcy made no defense, but Mrs. Shepard and the sons, Alpheus and William S., answered.

They admitted the mortgage, but claimed that the property was not described in it as in the bill, and proceeded to give a verbatim copy of the description as follows, from the mortgage: "South half of southeast quarter of section nine, township seven north, of range one west, excepting lots number six, ten and eleven, on block number eight; also lots sixteen and seventeen; also lots number one, two, fourteen, fifteen, and eight, on block number seven, and lots number one and ten, on block number six, including mill-lot number one, on block number three, with mills thereon; also lot number three, on block two, with store thereon, in the village of Shepardsville, being on north half of southeast quarter of said section nine."

This description corresponds with that in the mortgage, and the apparent discrepancies between it and the claim in the bill are of no practical importance in the case. The suit is not brought to reform the mortgage or to obtain a

SHEPARD v. SHEPARD.

clearing up of ambiguities, and there are no materials for either. The plat is not in evidence, or any intelligible or proper description of it, and there is no proof touching its application to the tract. We cannot take judicial notice of the relative situation of lots and blocks on the map or plat, or as to how they apply to the ground. There is no question as to the identity of the mortgage, and if the bill is not accurate in its assumption of the effect of the mortgage description, it can do no harm to the defendants. Any order of sale would have to follow the description in the mortgage, and not one possibly different.

If either party wished a judicial settlement as to what precise parcels of ground the description attached to, in view of the terms used, a proper case therefor should have been made and followed by proper proof.

The answer further maintained, on the part of the defendants Alpheus and William S. Shepard, that the deed from the mortgagors to them and mentioned in the bill was duly delivered previous to the mortgage, and that complainant took the mortgage with actual knowledge that they had become owners of the land by virtue of such deed. And on the part of Mrs. Shepard, the answer alleged that when the mortgage was given by herself and husband she was absolute separate owner, by virtue of a conveyance to her from her husband on the 15th of February, 1871, of lots one, two, three, four, five, seven, eight, nine, thirteen, fourteen, fifteen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-four, twenty-five and twenty-six, in block number eight in the village of Shepardsville, according to the plat of said village, being a part of the south half of the southeast quarter of section number nine, in township number seven north, of range one west; and she made the deed from her husband part of her answer, and annexed it. On turning to the deed so made a part of the answer, the description, instead of placing the lots on part of the south half of the quarter, as in the body of the answer, places them on a part of the east half. This is perhaps not im-

SHEPARD v. SHEPARD.

portant, because the effect of the two statements would be to place the lots on the southeast quarter of the southeast quarter.

On the part of Mrs. Shepard the answer further stated, that she understood the complainant claimed that these lots were covered by the mortgage, and that if the mortgage did cover them, it was by the mistake of her husband in drawing up the instrument; that when she executed it she did not know what it contained, and did not intend to encumber her separate property; and that her husband "intended to exempt her said land from the description of land in the said mortgage;" and further, that complainant was at the time advised that she owned said lots.

It is noticeable that the answer on the part of Mrs. Shepard nowhere alleged that by its terms the mortgage covered the land she claimed. On the contrary, it seems to have been framed on the assumption that whether or not the mortgage by its terms did cover that land, was uncertain and a matter to be specially inquired into and determined.

The decree declared that so far as the same could be ascertained from the mortgage and bill of complaint, the property authorized to be sold was all of block seven in the village of Shepardsville, except lots one, two, eight, fourteen and fifteen, and all of block six in said village, except lots one and ten, and mill-lot one in block three, with the mills thereon, and lot three in block two, all in said village. It dismissed the bill as to the south half of the southeast quarter of section nine, not included in the village of Shepardsville, and also as to all lands in block eight in said village, with the declaration that the court found the lands last named were not included in the mortgage.

The attaching to the answer of what was said to be a copy of the deed to Mrs. Shepard from her husband only amplified the pleading. The deed was not thereby proved and made evidence in the case, and it is not found anywhere in the record as an exhibit. In one place such a

SHEPARD V. SHEPARD.

deed is referred to as offered in evidence and as marked exhibit C; but exhibit C represents a deed to Alpheus F. and William S. Shepard. And in another place a deed to Alpheus F. and William S. Shepard is indicated in the evidence as exhibit D, whereas there is no exhibit D. These defects are, however, not important in the view taken of the case.

It is too plain for discussion that the claim of Mrs. Shepard is not maintainable.

It is not pretended that the alleged conveyance from her husband to herself, and on which she grounds her entire right, had been placed on record at the time the mortgage was given; and there is no proof whatever in the case, that complainant had the least hint that she had any separate interest or any right as grantee.

Her husband deliberately drew the mortgage on the lots she claims and she joined in the execution. The complainant exercised no influence or control. According to the facts, he supposed, and had every reason to suppose, that the lots in question actually belonged to her husband, and that the mortgage was properly and rightly given upon them. He was not privy to any mistake, if any was made, and did nothing to lead to a mistake. He received the mortgage as Mr. Shepard drew it and as it was deliberately and freely executed.

As the case stands, the mortgage would have been good against her on these lots, except as to a possible dower claim in future, if she had not signed at all. Under the registry laws the complainant would have been protected as mortgagee in good faith in a mortgage made by the apparent owner. Waiving, however, this answer to her claim, there is no substance in the charge of mistake.

Untrammelled by any other contract, and without any thing to mislead, Mr. Shepard deliberately framed the mortgage and both freely executed and acknowledged it and passed it to complainant.

There is no pretense—there could be none—that Mr.

SHEPARD v. SHEPARD.

Shepard was not aware of the scope of his description. He knew full well what it included. The instrument was delivered as a mortgage of all unexcepted lots within the general description. In good faith complainant so received it, and he was entitled to believe the other parties designed it should so operate.

It is now claimed that it may be overthrown and annulled as to certain lots upon the oath of Mrs. Shepard that she did not know what the mortgage covered when she signed it, and that she held a secret purpose not to mortgage the lots in question, and upon the oath of her husband, in contradiction of his deliberate act, that he also had a secret design to exclude these lots, and this, too, in face of the fact that he actually excepted other lots about them. The bare statement is sufficient. The law requires very strong proof to support a real charge of mistake in a deed, and it has never gone so far as to convict a mortgage of embracing lands which ought not to have been put in, although in a condition to be so mortgaged and deliberately included by the mortgagor himself, on the naked ground that the mortgagor swears that he entertained a secret design to exclude such lands from the description.—*Benj. on Sales (Perkins ed.)*, § 55 and note I. See also *Tripp v. Hasceig*, 20 Mich., 254; *Boyd v. McLean*, 1 J. C. R., 590; *Gillespie v. Moon*, 2 J. C. R., 585; *Garten v. Chandler*, 2 Bibb, 246; *United States v. Munroe*, 5 Mason, 572; *Bryce v. Ins. Co.*, 55 N. Y., 240; *Marvin v. Bennett*, 26 Wend., 169; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass., 45; *S. C.*, 107 Mass., 290.

The claim made by defendants Alpheus F. and William S. Shepard, and which their father seems to have been extremely active in promoting by his oath and in other ways, is a remarkable one.

The theory is, that the father, in order to carry out an agreement which he had made with his former wife, conveyed the particular land in question to these sons January 19, 1870; that in order to enable him to take care of a

SHEPARD v. SHEPARD.

mortgage he had made to Allau Shelden & Co. on these very lands whilst these sons were owners, and to take care of complainant's debt, the sons reconveyed to him October 26, 1871, by deed recorded two days thereafter; that three days after the record of this deed to him, and whilst its purpose was unaccomplished and during efforts to accomplish it, he gave back a deed to the sons, and which was withheld from record; that twenty days thereafter he designedly mortgaged the lands to complainant and hence devoted it to the purpose for which as claimed the sons had deeded it to him twenty-five days before; and yet that in so mortgaging to complainant he deliberately and expressly united with the latter in an attempt to commit a fraud on the sons by overreaching his unrecorded deed to them of November first.

The testimony is conflicting. Complainant swears positively that he knew nothing of the deed of November first to the sons, and contradicts the statements of his being privy to an understanding with his uncle that he would take the mortgage notwithstanding the unrecorded deed and give it precedence by recording it first.

His case is inconsistent with the theory of the defense, that William Shepard engaged with him to defraud William's sons. On the other hand, it is essential to the defense as made on this record, that we should credit William Shepard in his earnest endeavor, in which his sons in the most amicable spirit support him, to prove his complicity in a plot to defraud them in order to benefit complainant.

The whole question turns upon the view to be taken of the evidence, and it would not be profitable to dilate upon it. We have given the facts a careful examination, and have not failed to attend to the proper inferences and presumptions, and the effect made upon our minds is, that whether the deed bearing date November 1, 1871, was or was not in existence at the time of the mortgage, or if in existence, whether or not it had been delivered, the complainant had no notice of it, and took his mortgage upon the

SHEPARD v. SHEPARD.

faith that his uncle still held under the grant just made on October 26th and recorded the 28th. We also think that blind remarks may have been made touching the shifts of title, and that whatever may have been the design in making them, they were not such as to be understood by complainant, and were not understood by him as referring to a deed from the father back to the sons within three days from the putting on record of the deed made by them to him October 26th; and especially in view of the reasons given for that deed. The case shows there was opportunity for ambiguous and misleading hints to complainant, and certainly the complexion of the defense and of much of the testimony and circumstances connected with its development are not assuring against their employment.

We think complainant was entitled to the usual decree of foreclosure, and for a sale of the premises as described in the mortgage.

The decree should be reversed, and the cause remanded with directions accordingly.

Complainant should be allowed his costs in the court below and of this court.

The other Justices concurred.

Robert M. Bailey and another v. Adelaide A. Bailey
and others.

Ejectment: Evidence: Death: Circumstances: Absence: Inquiries. In an action of ejectment by parties claiming through the heirs of one who is asserted to be deceased, oral evidence indirectly proving death is admissible, consisting of those circumstances from which the death of the person may be reasonably inferred, such as long absence without any intelligence from him, reputation in the family, and their conduct thereupon, and other circumstances.

BAILEY v. BAILEY.

Life: Presumptions: Death: Circumstantial evidence: Inquiries. The presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living; and when it is sought to prove death within that period by circumstantial evidence, there must be a showing of diligent inquiry at the last place of residence, and among relatives, and any others who probably would have heard of the person if living, and also at any known place of fixed foreign residence.

Ejectment: Undivided interest: Ouster: Evidence. In ejectment for an undivided interest in lands to which the defendants claim the entire title, evidence of proceedings by defendants to recover possession of the entire premises under a lease, and also that, although informed that plaintiffs claimed an interest, they insisted upon obtaining and taking actual and exclusive possession of the entire premises and excluding the plaintiffs, is admissible as tending to prove ouster under the statute.—*Comp. L. 1871, § 6228.*

Submitted on briefs January 19. Decided April 10.

Error to Lenawee Circuit.

Slacy & Underwood, for plaintiff in error, argued that the evidence relating to the statements of the brothers and sisters of Ira Smith as to whether they had heard from him, was pure hearsay, and that the inquiries should have been made at his last place of residence in California; that the plaintiffs to recover were bound to prove not only possession by their co-tenants, but actual ouster or its equivalent; that a mere denial of plaintiff's right is not enough, but it must be such as to amount to a disseizin of the co-tenant: *Edwards v. Bishop*, 4 N. Y., 61; *Ricard v. Williams*, 7 Wheat., 59; that our statute is the same as that of New York was originally, and their statute has been held to be simply an affirmation of the common-law rule: *Phelan v. Kelley*, 25 Wend., 389. See also *Bogardus v. Trinity Church*, 4 Sandf. Ch., 633.

Walker & Weaver, for defendants in error, on the competency of the evidence to prove by circumstances the death of Ira Smith, cited: 2 *Greenl. Ev.*, p. 265, § 278, e, f, g, h; *Jackson v. Bonham*, 15 Johns., 227; *Stevens v. McNamara*, 36 Me., 176; *Smith v. Knowlton*, 11 N. H., 191; *Doe v. Jesson*, 6 East, 80; *King v. Paddock*, 18 Johns., 141; *Sheldon v. Ferris*, 45 Barb., 124; that after the lapse of seven years without intelligence of the person the presumption of life ceases, and the burden of proof is devolved on the other party: 1 *Greenl. Ev.*, 41, notes and cases cited; that the proof of disseizin was sufficient under the statute to warrant the jury in finding an ouster: *Comp. L. 1871, § 6228*; that the assertion by one in possession, that he is

BAILEY v. BAILEY.

sole owner, and his selling, or offering to sell the whole, are equivalent to an express denial of conflicting rights: *Freeman on Co-tenancy & Partition*, 234; *Valentine v. Northrop*, 12 Wend., 495; *Carpenter v. Thayer*, 15 Vt., 556; *Helhuigs v. Bird*, 11 East, 50; *Clark v. Vaughn*, 3 Conn., 191; *Giddings v. Canfield*, 4 Conn., 488; *Allyn v. Mather*, 9 Conn., 128; *Cummings v. Wyman*, 10 Mass., 468; *Humbert v. Trinity Church*, 24 Wend., 589; 1 *Add. on Torts*, 423, 121; that if one enters under a deed with full covenants of warranty, and exercises acts of ownership over the whole, there is no room left for doubt that he holds adversely to any other part owner: *Freeman on Co-tenancy, etc.*, 224; *Tyler on Eject.*, 480-2; *Thomas v. Pickering*, 13 Me., 337; *Marcy v. Marcy*, 6 Metc., 371; *Wright v. Saddler*, 20 N. Y., 329; *Kithredge v. Lacks*, 17 Pick., 247; *Biglow v. Jones*, 10 Pick., 161; *Bogardus v. Trinity Church*, 4 Sandf. Ch., 633; *Van Dyck v. Bensen*, 1 Caines, 84.

MARSTON, J:

Plaintiffs below, defendants in error, brought an action of ejectment to recover possession of an undivided one-eighth of certain real estate situate in the township of Adrian, Lenawee county; jury trial, verdict and judgment for plaintiffs.

Plaintiffs and defendants both claim title through Daniel Smith, who died in April, 1845, leaving eight children, one of them named Ira, whose interests the plaintiffs below claimed to have acquired by conveyance from his heirs in 1871. The most important questions raised in the case grow out of the evidence introduced tending to show the death of Ira. It was claimed, and evidence was introduced tending to show, that Ira went to California in 1852 or 1853, and that he had not been heard from since 1856. Simeon Bailey, who went to California in 1855 and remained there till 1867, was examined and testified that he commenced making inquiries in California about Ira in 1856, in the neighborhood where he had been; that he heard different reports about Ira's leaving this place; some said he had gone on a prospecting tour, some that he had been drowned while crossing a stream; and that although witness continued his efforts to

BAILEY v. BAILEY.

find Ira so long as he (witness) remained in California, he could obtain no trace of him. As evidence tending in the same direction, Sala Smith, a brother of Ira's, was called and testified that Ira had gone to California in 1852 or 1853; that Ira's wife had received letters from him after he went away; that he (witness) had been living most of the time near where the wife and children of Ira had resided. He was then asked the following questions:

"State whether since 1856 you or any of the family, so far as you know, have ever heard from Ira."

"Have you made inquiries from your brothers and sisters to ascertain whether they have heard from him, or know any thing about him? And if so, state the result."

These questions were all objected to, objection overruled, and answered. The amount of evidence required to establish death depends very much upon the nature of the case in which the question arises. In cases like the present "oral evidence indirectly proving death, consists of those circumstances from which the death of the person may reasonably be inferred, such as long absence without any intelligence respecting him, reputation in the family, and their conduct thereupon, and other circumstances." "The presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living." Where an attempt is made to prove the fact of death within the period of seven years, from circumstances in connection therewith, "there must also be evidence of diligent inquiry at the place of the person's last residence in this country, and among his relatives, and any others who probably would have heard of him if living; and also at the place of his fixed foreign residence, if he was known to have had any." —2 *Greenleaf Ev.*, § 278, a, e, f.

Within the rules so clearly laid down by Prof. Greenleaf this case comes, and it does not seem necessary to attempt by any extended discussion to add force to the authority cited. We may, however, refer to *John Hancock Mut. Life*

BAILEY v. BAILEY.

Ins. Co. v. Moore, 34 Mich., 41, where the nature and character of the proof necessary to establish death in civil cases were discussed.

Evidence was introduced and admitted, under objection, that Henry M. Bailey had entered into possession of this land in 1846; that he remained in possession with his children, the plaintiffs below, until the spring of 1872, when Robert M. Bailey, one of plaintiffs in error, claiming title to the entire property, commenced proceedings to recover possession; these proceedings were commenced under a lease previously given by him, leasing the entire premises to said Henry M. Bailey. This evidence was introduced as tending to show an ouster of the plaintiffs below, defendants in error.

Plaintiffs in error claimed title to the entire premises under a warranty deed from Tristram H. Bailey, dated May 29, 1869, and although they were informed that defendants in error claimed an undivided interest in the premises, they yet insisted upon obtaining and taking actual and exclusive possession of the entire premises, and excluding the other claimants therefrom. We think such evidence was admissible as tending to prove ouster under our statute.—2 Comp. L., § 6228. See also *Valentine v. Northrop*, 12 Wend., 495; *Carpenter v. Thayer*, 15 Vt., 556; *Allyn v. Mather*, 9 Conn., 127; *Humbert v. Trinity Church*, 24 Wend., 587; *Wright v. Saddler*, 20 N. Y., 329; *Thomas v. Pickering*, 13 Me., 337. Some of the exceptions taken to the charge of the court have already been covered by what has been said; the others are not urged, and upon examination we do not discover any error therein.

As we discover no error in the record, the judgment must be affirmed, with costs, and the record remanded for further proceedings under the statute.

The other Justices concurred.

FENNELL V. COMMON COUNCIL OF BAY CITY.

The People on the relation of William H. Fennell
v. The Common Council of Bay City.

Fines: By-laws: Bay city: County treasury. Fines collected by the city authorities of Bay City on prosecutions before the recorder for violations of city by-laws do not belong in the county treasury.

Penal laws defined: Fines: Constitutional law. The term "penal laws" in the constitutional provision (*Art. XIII, § 19*), requiring all fines assessed and collected in the several townships for any breach of the penal laws to be exclusively applied to the support of libraries, refers to the laws of the state for the preservation of public order and which are enforced by the state authorities; and this provision does not extend to the numerous forfeitures and penalties growing out of breaches of duty that partake of the nature of a civil grievance or a merely local wrong, and which do not come within the category of criminal conduct.

City by-laws: Penalties: Disposition of proceeds. And all penalties which are fixed by and imposed under the city by-laws stand on the same footing in regard to the disposition of the proceeds; and the circumstance that like offenses are punishable also under state legislation, whether identically or otherwise, does not affect the question under consideration.

Fines: Police court of Detroit: State offenses. These fines are distinguishable from those collected by the police court of Detroit, which was a creature of the statute, having no jurisdiction to impose any penalties but those defined by the law itself; its authority being distinctly statutory and the penalties being neither imposed nor governed by ordinances.

Heard January 19. Decided April 10.

Application for mandamus.

G. M. Wilson, T. A. E. Weadock and Hatch & Cooley, for relator, cited: *Constitution, Art. XIII, § 12*, and referred to the several sections of the charter of Bay City bearing upon the question, and argued that the moneys in question are fines: See *2 Bow. Dic., 526; Webster's Dic.*; that the offenses for which they are imposed are violations of penal laws and are many of them crimes under the state laws: *Comp. L. 1871, §§ 1960, 8175, 7700, 2138; Laws of 1875, p. 284, § 2*; that the procedure by which the punishment is inflicted is after the analogy of criminal cases, and so is the character of the punishment, by fine and imprisonment; that penal statutes are those which inflict a penalty for the violation of some of their provisions: *2 Bow. Dic., 323*; that the prosecution under the ordinances is a criminal prosecution, and if so would be a bar to a prosecution for the same offense under the general statutes: *Cooley*

FENNELL v. COMMON COUNCIL OF BAY CITY.

Const. Lim., 199; *Levy v. State*, 6 *Ind.*, 281; *Blatchery v. Moser*, 15 *Wend.*, 215; *Rogers v. Jones*, 1 *Wend.*, 237; *People v. Stevens*, 13 *Wend.*, 341; *Brooklyn v. Toynbee*, 31 *Barb.*, 282; *New York v. Hyatt*, 3 *E. D. Smith*, 156; *State v. Crummy*, 17 *Minn.*, 72; *State v. Cowan*, 29 *Mo.*, 330; and see *Foz v. State of Ohio*, 5 *How.*, 410; *Moon v. People*, 14 *How.*, 13; *U. S. v. Marigold*, 9 *How.*, 560; *State v. Welch*, 36 *Conn.*, 215; *Davenport v. Bird*, 34 *Iowa*, 524; *Jones v. Fireman's Ins. Co.*, 2 *Daily*, 307; that as to all fines recovered under those parts of ordinances which are identical with the general statutes, they will be regarded as recovered under the latter; that the city officers having so kept their accounts as to have mixed those fines which belong beyond controversy to the county with those of the city, and so confused them as to make it impossible to separate them, the whole fund should be turned over to the county: *Story on Agency*, § 205; *Wren v. Kirton*, 11 *Ves.*, 377; *Lupton v. White*, 15 *Ves.*, 432; *Fletcher v. Walker*, 3 *Madd.*, 46; 1 *Story Eq. Jur.*, § 623; *Mass. Life Ins. Co. v. Carpenter*, 2 *Sweeny*, 734. They also cited, to the main proposition: 8 *Mich.*, 392; 17 *Mich.*, 390; 18 *Mich.*, 445; 27 *Mich.*, 267.

W. Scofield, for respondents:

City by-laws and ordinances are entirely of local application and intended for local benefit, and are passed by a body independent of the county, in whose action the county has no voice; there is a marked difference between a mere local by-law or ordinance and a general state law: 26 *Mich.*, 422; and city by-laws and ordinances are not criminal laws, and cases under city ordinances cannot be brought into the supreme court by writ of error or exceptions, and they resemble criminal cases only in being penal proceedings; and no offense is a crime which does not violate the laws of the land: 8 *Mich.*, 110, 262.

In the cases where this question of fines has heretofore arisen in this court, the fines were collected for breaches of state laws, and not merely of ordinances passed under them: 17 *Mich.*, 390; 18 *Mich.*, 445; while the fines in question in this case were collected for violations of mere city by-laws and ordinances.

As to whether the same act may be an offense against the general law and also against a local ordinance and may be punished in both cases: See 18 *Mich.*, 445; 3 *E. D. Smith*, 156; 9 *How.*, 569; 14 *How.*, 19; 14 *Ala.*, 400; 6 *Ind.*, 852; 24 *Mo.*, 96; 13 *Wend.*, 341; 15 *Wend.*, 215.

FENNELL v. COMMON COUNCIL OF BAY CITY.

CAMPBELL, J :

The relator, who prosecutes as county treasurer of Bay county, asks a *mandamus* to compel the city authorities to pay over such funds as have been paid into their treasury upon fines collected for violations of city by-laws, on prosecutions before the recorder. The ordinances under which these fines were collected were all passed to punish various kinds of disorderly persons and conduct, most of which were to some extent also placed under condemnation of some kind by state law, and some of which are punished more or less severely by statute. In one instance the statutory punishment is the same with that under the by-laws.

The defense is, that these collections were not made under the "penal laws" of the state, but under the city ordinances.

The constitution declares that "all fines assessed and collected in the several counties and townships for any breach of the penal laws," shall be exclusively applied to the support of libraries.—*Art. XIII.*, § 12.

This provision does not differ from that in the constitution of 1835, except that by that certain militia exemption moneys were included in the same fund. That constitution declared that "the clear proceeds of all fines assessed in the several counties for any breach of the penal laws shall be exclusively applied to the support of such libraries."—*Art. X.*, § 4.

The only statutes ever passed on the subject were passed under the old constitution, and appropriate not only "fines for any breach of the penal laws of this state," but also penalties and forfeitures imposed by law or collected under recognizances.—*Chapter 128 of R. S. of 1846, entitled "Of the collection of penalties, forfeitures and fines, and of forfeited recognizances," section 41; also section 116 of the Primary School Act, p. 233.*

These provisions have remained unchanged, the chapter on the collection of penalties, etc., never having been modi-

FENNEL V. COMMON COUNCIL OF BAY CITY.

fied, and the section in the primary school act having been re-enacted.—*C. L.*, § 3673.

These are the only laws which require such moneys to be paid over to the county treasurer. The constitution says nothing about it. The laws then and since have recognized a distinction between penal forfeitures for the violation of the laws of the state for the preservation of the public order and enforced by the state authorities, and the multitudinous forfeitures under contracts, taxes, highway laws and other statutes, where a liability arises to incur penalties to the state or local interests or private parties aggrieved, where the omissions of duty have not been treated as coming within the category of criminal conduct, but partake of the nature of a civil grievance or of a merely local wrong. There has never been any law requiring such moneys to be paid to the county treasurer.

By the charter of Bay City, all fines imposed by any by-law or ordinance of the common council may be sued for by the city attorney in the name of the corporation (*sec. 57*) before the recorder or police justice. The city may remit any such fines (*sec. 61*), and it is declared that "all fines, penalties or forfeitures recovered before the recorder and police justice shall, when collected, be paid into the city treasury, to be appropriated as the council may direct.—*Sec. 67*. By *section 55* the powers belonging to the person designated as "police justice" in that capacity are declared to be additional to his powers as a justice under the general laws of the state, and the recorder's judicial powers are those of a police justice, as prescribed by the charter (*sec. 31*), while his general duties are not judicial.

There can be no doubt whatever of the intention of the legislature to distinguish fines and penalties under the by-laws from those under state laws, and to dispose of them differently. The law evidently regards them as imposed to redress mischiefs injurious to the local interests. If these fines belong to the library fund, it must be because the

FENNELL v. COMMON COUNCIL OF BAY CITY.

charter is in that respect unconstitutional, and because the city by-laws are penal laws in the sense of the constitution.

There can be no ground for distinguishing one by-law from another in this regard. If the delegation of authority from the state to impose such consequences renders these provisions penal laws, no difference is found in the charter between any classes of acts which come within the control of the council. Whatever they can regulate by ordinance, they can and must regulate in the same way—having a discretion as to the amount of penalties, but none to distinguish between their effect when imposed. If the punishment is fixed by the by-laws, the penalties for whatever purpose must stand on one footing. The whole power is derived from the same sections of one charter. It so happens that on some subjects contained in these ordinances there is state legislation also, and in one instance it is identical in substance with the ordinances (in regard to a class of drunkards), but it cannot be claimed that a state prosecution could be interfered with or the penalty remitted by the corporation. How far a double jurisdiction may lawfully go in such cases, is a question not before us. But with this one exception, the city ordinances either punish by fine that which the state has not so punished, or impose punishment very different in degree. The charter does not permit most misdemeanors to be punished by ordinance as severely as under the state laws, and the penalties are very different, and the whole system is aimed at furthering local interests and redressing wrongs against the municipal policy.

We have heretofore on more than one occasion intimated that the penal laws referred to in the state constitution were the laws of the state. The term *law*, as defined by the elementary writers, emanates from the sovereignty and not from its creatures. The legislative power of the state is vested in the state legislature, and their enactments are the only instruments that can in any proper sense be called laws. In the decisions of this court referring to the class

FENNELL v. COMMON COUNCIL OF BAY CITY.

of provisions now before us, the distinction has been very expressly indicated.—*Wayne County v. The City of Detroit*, 17 Mich. R., 390; *People v. Controller of Detroit*, 18 Mich., 445; *Mixer v. Supervisors of Manistee County*, 26 Mich., 422.

It is claimed, however, that certain of these fines may be regarded as imposed under the laws of the state, and the cases in the 17th and 18th Michigan are cited for that purpose. Those cases, however, are very different. There the city charter, which was itself a state law, authorized the police court, which had no jurisdiction whatever to impose any penalties in the cases in question but those defined by the law itself, to deal with those particular cases and punish them as the statute directed. The authority was distinctly statutory, and the penalties were neither imposed nor governed by the ordinances. The only important question involved was, whether special provision could be made for punishing unlawful acts in a single city; and that was decided to be lawful.

We have not been able to discover in any of the acts governing Bay City provisions analogous to those in the Detroit acts. The Detroit police court was not created by the charter, but by an independent statute passed under the old constitution and continued in force by the schedule to the present constitution. Its duties are the same in substance with those of justices in criminal cases, and are almost exclusively confined to dealing with criminals against state laws. The provisions referred to were part of a new police system. The recorder's court of Bay City is organized under the charter for city purposes, and nothing has been done to give it any special powers over peculiar classes of misconduct, punishable by statutory penalties. The case seems to present no features different from what would appear where the penalties were imposed for any act forbidden by ordinance, whether involving serious and general considerations or relating to local convenience.

Some very interesting questions are discussed in the argu-

FENNELL v. COMMON COUNCIL OF BAY CITY.

ments, but the only question of moment is, whether this money belongs in the county treasury for distribution. If it does not belong there, the relator is not concerned in its uses, and cannot inquire into its sources or its disposition.

We think the *mandamus* should be denied, without costs to either party.

The other Justices concurred.

Richard Jones v. Dwight Sackett.

Vendor's lien: Primary school lands: New certificates: Fraud. A bill to establish and enforce an equitable lien for a portion of the purchase price of certain primary school lands, brought by an intermediate owner of said lands against his vendee, is sustained upon proofs showing that after the original purchase and an assignment of a portion by the original purchaser through mesne conveyances to the complainant, and a sale by complainant of his portion to defendant, with delivery of possession, the defendant, through collusion with the original purchaser, procured new certificates from the state land office to himself and such original purchaser for their respective interest; and that defendant afterwards, upon a settlement with complainant, assigned to him all defendant's interest in these lands as security for payment of the amount due him, though this assignment is repudiated by defendant as having been executed on Sunday and under threats of criminal prosecution.

Heard January 23. Decided April 10.

Appeal in Chancery from Barry Circuit.

C. G. Holbrook and *E. A. Holbrook*, for complainant.

Brackett & Huggett, for defendant.

MARSTON, J:

David R. Cooley, at a private sale October 24, 1853, purchased certain primary school lands from the state, made the first payment thereon and received the usual certificate

JONES V. SACKETT.

of purchase. In 1855 Cooley assigned his interest in a portion of this land to Henry Miller, who, in the autumn of the same year, assigned his interest therein to complainant. The latter, upon the 28th day of March, 1856, by an instrument in writing, sold his interest therein to defendant in consideration of the sum of four hundred dollars, payable fifty dollars cash, fifty dollars October 1, 1856, and fifty dollars upon the first of October each year thereafter until the whole sum should be paid, with annual interest thereon. Each party successively at the time of making his purchase entered into possession of the premises. Complainant files his bill claiming an equitable lien upon these lands under an agreement hereafter referred to, dated March 2, 1858, for the unpaid purchase money. In his bill of complaint he alleges that defendant, with intent to cheat and defraud him, procured from David R. Cooley, the original purchaser, in February, 1857, an assignment of his (Cooley's) interest in these lands; that he obtained from the supervisor a certificate that the lands could be divided without prejudice to the primary school fund, and that the original certificate to Cooley, with his assignment to Sackett endorsed thereon, and the certificate of the supervisor, were surrendered up and delivered to the commissioner of the state land office, and new certificates issued by said commissioner, one to defendant for the north half, being the lands assigned by complainant to defendant, and one to Cooley for the south half, and that defendant claims under his assignment from Cooley and under this new certificate issued as stated, June 5, 1857.

Defendant in his answer admits that Cooley purchased these lands from the state, but denies that he assigned to Miller or that Miller assigned to complainant, and denies that he (defendant) purchased from Miller or ever entered into possession under complainant. He admits that he purchased from Cooley, as already stated, and procured a new certificate from the state, and claims that the purchase

JONES v. SACKETT.

from Cooley was a *bona fide* one, for a consideration of three hundred dollars actually paid by him to Cooley.

Complainant in his bill alleges that a settlement was made by him with defendant March 2, 1858, at which time defendant, to secure him the amount then due, assigned all his interest in these lands to complainant as security. Defendant admits making this assignment, but alleges that it was executed on Sunday and under threats of a criminal prosecution. Other matters are set up by way of defense, but we do not consider it necessary to refer to them. We are satisfied from the proofs in the case that complainant's claim is correct, and that the purchase by defendant from Cooley and obtaining a new certificate thereunder was done for the purpose of cheating and defrauding complainant. Defendant does not himself testify in any very satisfactory manner how he paid Cooley the three hundred dollars he says he did, while Cooley denies ever having received any thing for such assignment. We do not consider it necessary to state all the reasons which lead us to this conclusion. There are various facts and circumstances all pointing to the same result.

Although we have carefully examined and considered the various objections urged by defendant why complainant should not have the relief sought, we have been unable to discover any sufficient legal or equitable ground to sustain all or any of the defenses raised.

The decree must be affirmed, with costs. The defendant will, however, be allowed ninety days' additional time to satisfy the decree before sale.

The other Justices concurred.

BURNS V. BENDER.

The People on the relation of John D. Burns v.
George H. Bender.

School districts: Disbursement of school moneys: Assessor: Treasurer: District officers. The disbursement of all school moneys is required by the statute (*Comp. L. 1871, §§ 3623, 3618, 3609*) to be made by orders drawn on the assessor by the director and countersigned by the moderator; and all moneys belonging to the district in the town treasurer's hands are required to be paid to the assessor on warrants drawn by the director and countersigned by the moderator. The assessor is made treasurer of the district, and required to hold all district moneys until properly drawn out by warrant. It is made the express duty of the director to draw and sign warrants upon the township treasurer, payable to the assessor, for all moneys raised for district purposes, or apportioned to the district by the township clerk, and present them to the moderator to be signed; and it is made the duty of the moderator to countersign such warrants.

Town treasurers: District moneys: Disbursement: Transfer to assessor: Moderator. District moneys in the hands of the town treasurer are not subject to be applied to any district purpose except through the hands of the assessor. And the duty of suing to thus transfer them into the custody of the assessor if qualified, is laid on the director; and the duty of procuring this transfer within some reasonable time is not discretionary, but absolute. The moderator is bound under ordinary circumstances to countersign all orders of the director for that purpose; and if he refuses in a proper case to do so, *mandamus* will lie to compel him.

School moneys: Warrant: Moderator: Mandamus: Relator. The statute making it the duty of the director to present the warrant to the moderator for signature, he may properly be a relator to obtain it by compulsion of law when refused. He is the proper custodian of the completed warrant, for the purpose of delivery to the assessor.

Mandamus: Relator: Assessor. The query is suggested, whether the assessor would not also be a competent relator.

Town treasurers: School moneys: Payments: Warrants. The town treasurer has no authority to make payments of district moneys, even to the assessor, except upon the warrant prescribed by statute; and no payment not authorized by warrant is a valid official payment, such as to preclude the district from holding him responsible for moneys lawfully in his hands. Payments made otherwise than in the prescribed mode are made in his own wrong, and cannot diminish the fund for which he is responsible.

Double functions: Town treasurer: School moderator: Duty. Respondent occupying the double position of moderator and town treasurer, is not thereby authorized to set up his previous illegal disbursements of the district moneys as treasurer as an excuse for not doing his duty as moderator; his double functions will not relieve him in one capacity from doing his duty in another.

Submitted on briefs January 23. Decided April 10.

Application for *mandamus*.

BURNS v. BENDER.

E. S. Pratt, for relator, cited: *Comp. L. 1871*, §§ 1025, 3623, 3609; 23 *Mich.*, 111; *High on Ex. L. Rem.*, 330, and cases cited.

McIntyre & Rice, for respondent, cited: 19 *Mich.*, 299; 4 *Mich.*, 103, 98; *Comp. L. 1871*, §§ 3609, 3613; *School Laws 1873*, p. 30, and note to § 29.

CAMPBELL, J:

The relator, who is director of the district, asks a *mandamus* to compel the respondent, who is moderator, to countersign an order in favor of the assessor of the school district, for district money in the hands of the town treasurer.

The statute is very clear that the disbursement of all school moneys shall be made by orders drawn on the assessor by the director and countersigned by the moderator.—*C. L.*, §§ 3623, 3612, 3609. It is equally clear that all moneys belonging to the district in the town treasurer's hands shall be paid to the assessor on warrants drawn by the director and countersigned by the moderator.—*C. L.*, §§ 1025, 3609, 3623. These orders on the town treasurer are not negotiable, but are designed to transfer the moneys to the assessor officially, as the depository or treasurer of the district, who is to hold all such moneys until properly drawn out by warrant.—*Fractional School District v. Mallary*, 23 *Mich. R.*, 111; *Fox v. Shipman*, 19 *Mich. R.*, 218.

It is made the express duty of the director to "draw and sign warrants upon the township treasurer for all moneys raised for district purposes, or apportioned to the district by the township clerk, payable to the assessor of the district" (§ 3623), "and present them to the moderator to be signed by him."—*Id.*

It is made the duty of the moderator to countersign such warrants.—§ 3609.

When moneys are in the hands of the town treasurer belonging to the district, they are not subject to be applied to any district purpose except through the hands of the

BURNS v. BENDER.

assessor, and the duty of suing to thus transfer into the custody of this officer if qualified, is laid on the director. As the assessor is the only legal district depository, the duty of procuring this transfer within some reasonable time is not discretionary, but absolute, and the moderator is bound, under ordinary circumstances, to countersign all orders of the director for that purpose. The assessor's bond is deposited with the moderator, who cannot, therefore, be ignorant as to his position, and the town treasurer has no concern in the matter. It is impossible for the district to be legally damnified by the reception of its own money. In the case of disbursements out of the fund in the assessor's hands, the moderator may no doubt object to signing any unauthorized warrants.—*Stockwell v. Town Board of White Lake*, 22 Mich., 341. But it must be a very plain case of wrong, if any case is possible when there is a qualified assessor under good bonds, where the moderator can refuse to enable the district to obtain its own funds. And the town treasurer has no right to object.—*McPharlin v. Mahoney*, 30 Mich., 100.

It is objected that the assessor, and not the director, should appear as relator.

We are not prepared to say that the assessor would not be a competent relator.—§ 3613, C. L. But under the statute, which makes it the duty of the director to present the warrant to the moderator for signature (§ 3623), it is plain that the assessor is expected to receive the warrant in its completed form from the director, and that a warrant not countersigned is not to be delivered over. As the director is to be the active party in procuring the moderator's signature, we think he may properly be a relator to obtain it by compulsion of law when refused. He is the proper custodian of the completed warrant for the purpose of delivery to the assessor.

The objection to the *mandamus* is upon the claim that no money is in the hands of the township treasurer belong-

BURNS v. BENDER.

ing to the district, and that there is no right, therefore, to any warrant.

The fact is admitted, that on the 4th of September, 1876, the town treasurer had in his hands one hundred and twenty dollars of district money. It is also admitted that the relator, the assessor and the moderator, are the persons named in the papers. Respondent now occupies the double position of moderator and town treasurer. He claims that as town treasurer, and before he is averred to have become moderator, he paid over the money to a former assessor named Hiram H. Bradford, on the 5th of September, 1876, and that Bradford disbursed it to pay a teacher who had a valid contract against the district, but it is not claimed this payment was under any warrant.

As an assessor can pay out no money lawfully without a warrant, such use of the money is quite foreign to this issue. The question here is, whether the payment to him by the treasurer was warranted. If not, then his use of it becomes unimportant. There is no averment that he paid it out in such a way as would have been lawful. No payment not authorized by warrant would be a valid official payment so as to preclude the district from holding him responsible for moneys lawfully in his hands. And on the other hand, a town treasurer has no right to pay money to an assessor until he produces the warrant of the director and moderator. All district funds once in the hands of the town treasurer must in law be regarded as continuing in his official custody until lawfully drawn out. Payments made otherwise are made in his own wrong, and cannot diminish the fund for which he is responsible.—*McCormick v. Bay City*, 23 Mich., 457.

In this case the moderator is seeking to set up a defense which belongs properly to the treasurer. Still the exhaustion of the fund by legal payments might be a sufficient reason for not compelling a warrant to be issued which would be nugatory.

BURNS v. BENDER.

But there is neither suggestion nor pretext that any of the district fund of one hundred and twenty dollars was ever drawn out of the treasurer's hands by warrant. We need not conjecture why no previous warrant was drawn in favor of the old assessor, or why he ceased to be assessor. There are certainly ways imaginable for an assessor to be lawfully removed, and reasons—as for example, his failure to give bond—why moneys might not have been placed in his hands by the director and moderator. We need not speculate on the reasons which may have led the treasurer to pay money which he had no right to pay. Such a payment was not a lawful payment as against the district, and affords no reason why he should not answer the call of a warrant, and furnishes no excuse to the moderator for not signing it. His double functions as moderator and treasurer will not relieve him in one capacity from doing his duty in another.

No reason is shown why the *mandamus* should not be issued, and it is allowed as prayed.

The other Justices concurred.

Lyman H. Austin and another v. George French.

Mortgages: Foreclosure: Personal property: Receiver: Replevin. A bill in equity having been filed to foreclose a mortgage covering real and personal property, and a receiver having been appointed and having taken possession of the personal property, it was held, in a replevin suit afterwards brought against such mortgagee and receiver by a subsequent purchaser from the mortgagor, who had been made defendant to the foreclosure bill, that the questions of the sufficiency of the description of the property in the mortgage to affect a purchaser with only constructive notice, and whether such subsequent purchaser had any actual notice, were questions to be raised in the first suit, and not by attacking the proceedings therein through an action at law; that the same question could not be tried in both suits, and much less could a party remove it from one court to another in this collateral way.

AUSTIN v. FRENCH.

Chattel mortgages: Sufficiency of description: Question of law. The submission to the jury of the question of the sufficiency of the description in the mortgage as a question of fact, is held to be error.

Chattel mortgages: Description: Foreclosure suit: Replevin. The question of the validity of the mortgage as a lien on the property intended by it in the hands of the plaintiff in replevin, belonged to the court of chancery in the foreclosure suit; in the replevin suit the plaintiff must recover, if at all, by establishing the fact that the property described in the writ was property not covered by the mortgage, and as to any property embraced in the mortgage, the replevin suit must fail.

Submitted on briefs January 23. Decided April 10.

Error to Superior Court of Grand Rapids.

Taggart, Simonds & Fletcher, for plaintiffs in error.

Blair, Stone & Kingsley, for defendant in error.

COOLEY, CH. J:

The action in the court below was replevin, brought for the recovery of property described in the writ as "one span of horses—one brown named Charley, and one bay named Dave—of the value of two hundred dollars; one lumber wagon of the value of fifty dollars, two pairs of logging trucks of the value of one hundred dollars, seven pairs of logging bobs of the value of one hundred and five dollars, and two sets of road bobs of the value of twenty-five dollars." The plaintiff showed that he bought this property of one Andrew Moody. The defense was, that in Moody's hands the property was subject to a mortgage given by him to Raynsford, covering real as well as personal property, and given for the purchase price of the whole; that a bill in equity had been filed in the Kent circuit court to foreclose this mortgage, making this plaintiff, among others, defendant, and that in that suit Austin had been appointed receiver and had taken the property in pursuance of his order of appointment. The existence of this mortgage and of the suit in equity upon it were not disputed, and it was shown that the mortgage was duly filed as a mortgage of chattels and recorded as a mortgage of realty. The prin-

AUSTIN v. FRENCH.

cipal contest appears to have been over the question whether the property was so described in the mortgage as to make that instrument constructive notice to a purchaser, though there appears to have been a claim also that some of the property replevied was not embraced in the mortgage at all. The following is the description in the mortgage: "All the following described real estate and personal property, to-wit: the northwest quarter of the southwest quarter, and the south half of the southwest quarter of section seven (7), and the north half of the northwest quarter of section eighteen (18), all in town ten (10) north, in range ten (10) west, in the county of Kent, state of Michigan; and also the northeast quarter of the southwest quarter of section six (6), in town and range aforesaid, consisting in all of and comprising two hundred and forty acres of land; also the steam saw-mill situated on said land, and the machinery and appurtenances thereto belonging or in any wise appertaining; also the following described property: five horses, one shingle shed, one yoke of oxen (white or nearly white); one lumber wagon, one pair of trucks, two sets of harness, twelve sets of bob-sleighs, and all tools, chains, and implements of every kind used in and about the said mill; also all the pine timber on the northeast quarter of the southwest quarter of section seven (7), in said town ten (10), range ten (10), aforesaid, being the same property this day sold and conveyed by said Raynsford to said Moody, and this mortgage and notes herein described being given to secure the unpaid purchase money, together with the tenements, hereditaments and appurtenances thereunto now or hereafter belonging or in any wise appertaining or thereupon situated."

In the order appointing a receiver, the property was referred to merely as "the real and personal property and estate mentioned and described in the mortgage set up and described in the bill of complaint herein." The following, among other instructions, were given to the jury: "The court instructs you that if the property referred to in the mortgage was such that there was not sufficient description

AUSTIN v. FRENCH.

of the property, then it would not operate as a constructive notice to an innocent purchaser.

“The court further instructs you that if you find from the evidence before you that there was such a description as that a person looking at the mortgage, and then making inquiries indicated by the mortgage, could reasonably ascertain whether this identical property was there, that would be a sufficient description of the property.”

Both these instructions appear to assume that the mortgage might have been sufficient to enable the mortgagee to hold the property as against the mortgagor, and yet not sufficient as against the plaintiff, who had purchased from the mortgagor. In this assumption the judge must have overlooked the fact that the point was necessarily involved in a suit to foreclose the mortgage against this plaintiff, and that the order appointing a receiver was, if not a final, at least an interlocutory adjudication against this very claim. The suit in replevin, by which French seeks to try at law the same question which the bill in equity necessarily requires him to meet, is really in the nature of an appeal in a collateral proceeding from the order appointing a receiver, and if the judge is correct in his rulings, and French is enabled thereby to sustain his claim that the mortgage does not affect him, the court of chancery is in effect ousted of its jurisdiction before decree has been reached. But manifestly this is erroneous.

The question the judge should have submitted to the jury was, whether the property replevied, or any part thereof, was the same property mortgaged to Raynsford by Moody; if it was, the suit as to that property must fail, and French must make his defense in the suit in equity. The questions of the sufficiency of the description to affect a purchaser with only constructive notice, and whether French when he purchased had any actual notice, were questions to be raised in the first suit, and not by attacking the proceedings in that suit through an action at law. The same question cannot be tried in both suits; much less can a party re-

AUSTIN v. FRENCH.

move it from one court to another in this collateral way. The court of equity has cognizance of it now, and there it must remain until regularly disposed of, by decree or otherwise.

As this view renders a new trial essential, we need not comment upon the error of the judge in submitting to the jury as a question of fact the sufficiency of the description in the mortgage. The case was probably tried before the decision of this court in *Willey v. Snyder*, 34 Mich., 60, was reported. The mortgage was not void on its face for indefiniteness; if it were so, it might be questionable whether the property is sufficiently described in the writ; for the description there, as to some of it, is no more particular than in the mortgage.—See *Stevens v. Osman*, 1 Mich., 92; *Farwell v. Fox*, 18 Mich., 166. But it is sufficient to say here that the question of the validity of the mortgage as a lien on the property intended by it in the hands of French, belonged to the court of chancery. In the suit at law French must recover, if at all, by establishing the fact that the property described in the writ was not property which Moody bought of Raynsford and mortgaged back for the purchase price.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

William R. Brown v. The People.

Rape: Complaints of prosecutrix. On a trial for rape, the admission in evidence of the statement of the sister of the prosecutrix, that the latter made complaint to her the next morning that the prisoner on trial and another person named forced her in her chamber the evening before, is held not error.

BROWN v. PEOPLE.

Rape: Force: Resistance: Consent. Where on a trial for rape the act of intercourse is admitted, and the vital question is, whether it was by force and against the will of the prosecutrix, the jury must be satisfied beyond a reasonable doubt that she did not yield her consent during any part of the act; and considering the place, time, occasion and surrounding circumstances disclosed by this case, it was important the jury should scrutinize the facts bearing on this point very closely.

Rape: Charge to the jury: Yielding: Assent: Resistance. A charge to the jury in a rape case, that if they should find respondent used force, and complainant resisted so far as she was able to under the circumstances, they should find him guilty, even though they found she at last yielded, is held erroneous and misleading; the term "circumstances," as here used, may have been understood as including weakness of the will; and the term "yielded," as meaning an assent to the consummation or completion of the act; and if there was a yielding in that sense, there was no case to support a verdict of guilty.

Charge to the jury: Hypothesis not supported by evidence. The evidence on the part of the people being that the prosecutrix never yielded, and that on the part of the accused that she made no resistance, but assented from the beginning, there was no basis for a charge on the hypothesis of her having first made resistance but afterwards yielded.

Heard April 3. Decided April 10.

Error to St. Joseph Circuit.

O. J. Fast, S. C. Coffinberry and J. B. Shipman, for plaintiff in error.

Otto Kirchner, Attorney General, for the People.

GRAVES, J:

Plaintiff in error was lately convicted of the crime of rape, charged to have been committed in the evening of June 29, 1876, on Mary Jane Miller, who was between seventeen and eighteen years of age. She had been residing with her parents near Burr Oak, but some ten days or a fortnight before this occurrence had been taken into the family of Mr. Henry W. Laird to do housework for wages. A married sister, Mrs. Baker, resided within about a half a mile.

At the time in question Mr. Laird's family embraced several young men engaged as farm hands, and among them were his two sons, the plaintiff in error, and two others.

The prosecutrix alleged that on the evening mentioned she went to her bed-room up stairs, fastened the door,

BROWN v. PEOPLE.

retired to bed and soon fell asleep, but awoke in a short time and found plaintiff in error in bed with her, and that he then and there outraged her.

The details of her relation need not be repeated here. She further alleged that plaintiff in error, after consummating the act, left, and that in a very short time Gilbert Laird also entered the room and forcibly violated her person; that she made no attempt to leave the room and made no outcry; that she went to her sister's, Mrs. Baker's, the next morning, and made complaint.

The plaintiff in error and Gilbert Laird respectively admitted the acts of intercourse, but claimed they were with her assent or acquiescence. The case depended upon whether she was forced or not. There was no other question in dispute. An objection is made that the court allowed Mrs. Baker to relate the particulars detailed to her by the prosecutrix when complaining to her the next morning. In view of the shape assumed by the case and the character of the testimony of Mrs. Baker, of which complaint is made, I think the objection hardly tenable.

As reported in the record, Mrs. Baker barely testified that the prosecutrix claimed that the plaintiff in error and Gilbert Laird forced her the evening before in her chamber. It may be that a statement of this kind might not be proper in some cases, but I am not prepared to say it was error to admit it here. There is no occasion to dwell upon it.—*Burt v. The State*, 23 Ohio St., 394.

As already observed, the vital question for the jury was, whether the admitted act of intercourse was by force and against the will of the prosecutrix, or whether, on the other hand, it was by her will and consent. The jury were required to be satisfied beyond a reasonable doubt that there was no consent by the prosecutrix during any part of the act, before they could find the plaintiff in error guilty. And considering the place, the time, occasion, and the other circumstances disclosed by the record, it was very important that the jury should scrutinize the facts bearing on this

BROWN v. PEOPLE.

point very closely.—*Com. v. McDonald*, 110 Mass., 405; *State v. Burgdorf*, 53 Mo., 65; *People v. Brown*, 47 Cal., 447.

The circuit judge gave several instructions on this part of the case, and most of which were unobjectionable. One, however, in view of the facts, was improper and misleading. It was in these terms: "If you find that respondent used force, and that the complaining witness resisted so far as she was able to under the circumstances, you should find him guilty, even if you should find that the complaining witness at last yielded."

In the first place this charge is not clear. What was intended to be included in the term "circumstances" as something to prescribe limits to resistance or excuse further resistance, is not very certain. The jury may have taken the expression as including weakness of the will. Again, the term "yielded," as here used, is not free from ambiguity. The jury may have regarded it as meaning an assent to the consummation or completion of the act. And if there was a yielding in that sense, there was no case to support a verdict of guilty. A further objection to this instruction is, that there was no evidence which fairly authorized it.

The evidence on the part of the people was that the prosecutrix never yielded, and that given by the plaintiff in error was that she made no resistance, but, on the contrary, assented from the beginning. There was hence no basis in the evidence for the hypothesis contained in this charge.

Some other points are suggested, but they are not important. For the error in the charge, the judgment must be reversed and a new trial ordered. An order will be entered also for the surrender of the defendant to the sheriff of the county of St. Joseph, in order to allow such further proceedings as may be necessary.

The other Justices concurred.

CARTER v. CARTER.

William Carter v. Martha Carter.

Indefinite employment: Statute of limitations. Where a person goes into the service of another upon an indefinite promise of payment for the same, and no price and no period is fixed, the bargain and service are alike continuous, and the statute of limitations does not begin to run against the claim until the service is concluded; the right of action at the close of the service is an entire right and applies to the entire service, and the employe is entitled to claim for the whole amount of all unpaid wages for all the service rendered under the agreement.

Evidence: Value of services. Neighbors who have employed servants to do like work are competent to testify to the value of the services of a girl employed to do house work.

Heard April 4. Decided April 10.

Error to Branch Circuit.

This action was brought by defendant in error to recover of plaintiff in error, her uncle, the value of her services in doing house work in his family under a verbal arrangement whereby he requested her to do the work and promised her he would pay her for it. No time was fixed and no price agreed upon. The services continued during a period of about seven years, terminating September 14, 1869. The suit was brought July 8, 1875. The statute of limitations was pleaded in defense, among other things. The evidence of neighbors who had employed girls to do like work, as to the value of the services performed, was admitted against objection. The plaintiff had judgment below and defendant brought error.

Loveridge & Barlow, for plaintiff in error, upon the question of the evidence admitted as to the value of the labor performed, cited: *Lamoure v. Coryl*, 4 Denio, 370; *Harris v. Panama R. R.*, 3 Bos., 17; *Lincoln v. Saratoga R. R.*, 23 Wend., 432; *Terpenning v. Corn Ex. Ins. Co.*, 43 N. Y., 279; *Scott v. Lilienthal*, 9 Bos., 228. They argued that plaintiff's claim for services was barred by the statute of limitations except for services rendered from July 8, 1869, to September 14, 1869, and cited: *Comp. L. 1871*, § 7152; 16 Mich., 211; 22 Mich., 178; *Kimball v. Brown*, 7 Wend., 322; *Hallock v. Losee*, 1 Sand., 220; *Union Bank v. Knapp*, 3 Pick., 96.

The most favorable construction that can be put upon plaintiff's claim, under the statute of limitations, is, that the contract claimed by her is a continuing one, and that the part

CARTER v. CARTER.

of the last year's services from October 7, 1868, to September 14, 1869, would not be barred by the statute until September 14, 1875: See *Davis v. Gorton*, 16 N. Y., 255.

J. H. McGowan, for defendant in error.

Opinions, like other testimony, are competent in the class of cases in which they are the best testimony, and non-experts may give opinions as to value of services: 1 *Greenl. Ev.* (13th ed.), § 440, a; 35 *Barb.*, 105; 5 *Minn.*, 119; 8 *Allen*, 101; 42 *Barb.*, 36; 49 *N. H.*, 398; 13 *Metc.*, 288; 2 *Gray*, 107; 12 *Mich.*, 27; 17 *Mich.*, 296; 31 *Mich.*, 443.

There are two reasons why the claim of the defendant in error was not barred by the statute: (1) There was a mutual account between the parties, items of which were within six years from the commencement of suit; (2) The right of action did not accrue until within six years from commencement of suit.

If part of an open account current be within six years, it draws after it items beyond six years, so as to protect them from the statute: 5 *Johns. Ch.*, 522; *Br. Dig.*, 2542, ¶ 232, 233; and it makes no difference on which side the item is charged or credited: *Hager v. Springer*, 63 *Me.*, 506; *Hodge v. Manley*, 25 *Vt.*, 210; *Helms v. Otis*, 5 *Lans. (N. Y.)*, 137.

Payments upon an account for services are sufficient to render it an open and mutual account so as to prevent the remedy thereon being barred by the statute of limitations. It is not necessary that there should be mutual services: *Payne v. Walker*, 26 *Mich.*, 60; *Kimball v. Kimball*, 16 *Mich.*, 211; *Ang. on Lim.*

Again, the statute is not a bar to recovery in this case, as the right of action only accrued within six years of the commencement of the suit. The labor in this case was performed under an agreement to be paid therefor without specifying at what time such payment should be made or when such labor should cease. The statute did not commence running until the labor was ended: *Little v. Smiley*, 9 *Ind.*, 116; *Schoch v. Garrett*, 69 *Pa. St.*, 144; *Catholic Bishop v. Bauer*, 62 *Ill.*, 188; *Vanhorn v. Scott*, 28 *Pa. St.*, 316; 19 *Wis.*, 552; *Ang. on Lim.*, 120; *Zeigler v. Hunt*, 1 *McCord (S. C.)*, 577; *Adams v. Ft. Plain Bank*, 36 *N. Y.*, 255.

A cause of action accrues upon a contract at the time of the breach, and not at the time of making the contract: *Peck v. Cheney*, 4 *Wis.*, 249; *Ang. on Lim.*

GRAVES, J:

We think the verbal agreement of 1862 was for a single

CARTER v. CARTER.

though indefinite period of service, and not for a yearly hiring or for two or more terms.

The bargain and service were alike continuous.

As the understanding went on from day to day, so did performance by defendant in error on the strength of the request and promise of plaintiff in error. There was no suspension of the request or of the service. There was no break or rest or any understanding that there should be. The mutual assent for the continuance of the service, and the yielding of service under the arrangement, ceased at the same time; and while in course of being rendered the service was upon the agreement and in performance of it, and was not the subject of account, and it afforded no accrued and matured right to be affected by the statute of limitations.

A right capable of being acted upon by the statute might arise out of it, but had not yet arisen. When the transaction was closed by withdrawal of defendant in error on the 14th of September, 1869, an actionable right ensued against which the statute commenced running. But it was an entire right, and applied to the entire service. At that time defendant in error was entitled to claim for the whole amount of all unpaid wages for all the service she had rendered under the agreement. This disposes of the main charge of error.

The objection that certain witnesses were not qualified to testify in regard to the value of service, is not well founded. The doctrine has been so often considered that no discussion is called for.—*Sirrine v. Briggs*, 31 Mich., 443, and cases; *Stone v. Covell*, 29 Mich., 359; *Morrissey v. The People*, 11 Mich., 327; *Evans v. The People*, 12 Mich., 27; *Det. & Mil. R. R. Co. v. Van Steinburg*, 17 Mich., 99.

As no error is discovered, the judgment should be affirmed, with costs.

The other Justices concurred.

 BAY CITY BRIDGE CO. v. VAN ETEN.

The Bay City Bridge Company v. George H. Van Etten and others.

Equity jurisprudence: Suit to recover moneys wrongfully appropriated: Corporations: Officers. A bill by a corporation against its former officers to recover moneys they are alleged to have wrongfully and fraudulently voted to themselves for services performed as such officers, and a further sum they are alleged to have wrongfully made by the use of the company's moneys, cannot be said to save a multiplicity of suits; it might, if sustained, enable complainant to unite in one suit several distinct causes of action against different parties, but uniting them would be as likely to create confusion as to save difficulty. And if the defendants combined in a fraud, they can be sued jointly at law as well as in equity.

Corporations: Officers: Accounting: Appropriation of corporate funds: Remedy at law. Though officers of a corporation undoubtedly act in a fiduciary capacity, and may be called to account in equity as trustees, yet when they have ceased to be officers, and the only complaint made against them is of an appropriation of the corporate funds to their own use, and no discovery is sought, the reasons for seeking the aid of equity which commonly exist in cases of breach of trust, are wholly wanting; the courts of law are perfectly adequate to give effectual relief, and they are the most suitable tribunals for the purpose.

Accounting. A suit to recover moneys alleged to have been wrongfully taken, cannot be strictly called a suit for an accounting, any more than can any action for money had and received.

Equity jurisprudence: Remedy at law: Questions for jury. The remedy at law being ample, and the questions presented eminently proper for a jury to pass upon, no good reason is perceived for the retention of jurisdiction by the court of equity.

Demurrer: Amount: Remedy at law. While the failure to show an amount in controversy sufficient to give the court jurisdiction might not render the bill demurrable, yet it might be sufficient reason for the court declining to entertain the case when the remedy at law is entirely adequate.

Heard April 8. Decided April 10.

Appeal in Chancery from Bay Circuit.

Holmes, Collins & Stoddard, for complainant.

McDonell & Mann and *Wisner & Draper*, for defendants.

COOLEY, CH. J:

The bill of complaint in this cause is filed by the bridge company against three persons who for a series of years were directors of the company, and who also filled the

BAY CITY BRIDGE CO. v. VAN ETEN.

offices of president, secretary, superintendent and treasurer, to recover from them moneys which it is alleged they wrongfully and fraudulently voted to themselves for services performed as such officers, amounting in all to six thousand four hundred and fifty dollars, and also a further sum, not stated or estimated, which it is alleged they wrongfully made by the use of the company's moneys. The charges of fraud are very general, the principal allegation being that they knowingly voted to themselves severally more than their services were worth. There is no allegation that the votes were secret, or that they were kept from the records. The bill avers that the defendants for several years at stockholders' meetings, with intent to cheat and defraud, caused themselves to be elected directors; but this is obviously an allegation of no force or value, and no notice was taken of it on the argument. It may, perhaps, however, have some significance in leading us to a right estimation of other charges of fraud equally general in their terms.

The defendants demurred to the bill, and the court below dismissed it. The complainant seeks to maintain it on two grounds.

1. As a bill to bring trustees to an account for the misappropriation of moneys belonging to the trust;

2. On the ground that it saves a multiplicity of suits.

The second ground requires little attention. If the bill is sustained, it may enable the complainant to unite in one suit three causes of action against the defendants severally; but that is all. The issues in the case of each might well be different, and probably would be, and uniting them would be as likely to create confusion as to save difficulty. There is certainly no multiplicity of suits to be saved, and probably, so far as we may judge from the bill, no issue to be avoided. Moreover, if the defendants combined in a fraud, they can be sued jointly at law as well as in equity.

The first ground is more plausible. Officers of a corporation undoubtedly act in a fiduciary capacity, and may be called to account in equity as trustees.—*Story Eq. Juris.*, §§ 321, 322; *Perry on Trusts*, § 207. But when they

BAY CITY BRIDGE CO. v. VAN ETEN.

have ceased to be officers, and the only complaint made against them is of an appropriation of the corporate funds to their own use, and no discovery is sought, the reasons for seeking the aid of equity which commonly exist in cases of breach of trust are wholly wanting. The courts of law are perfectly adequate to give effectual relief, and they are the most suitable tribunals for the purpose.

In a certain sense, the suit to recover moneys alleged to have been wrongfully taken may be called a suit for an accounting, but only as any action for money had and received is such a suit. The moneys drawn for salaries were *prima facie* lawfully voted, and the questions that could be made concerning them would be such as it would be eminently proper a jury should pass upon. They would be, so far as we can judge from this bill, questions of fraud, of the value of services, and perhaps of acquiescence on the part of stockholders. There is, therefore, no good reason for the retention of jurisdiction by the court of equity, so far as the alleged excessive salaries are concerned. As to the profits said to have been made by the officers from the use of the company's moneys, we have also general allegations only, and the bill does not aver that the amount is sufficient to give the court jurisdiction on that ground alone. While the failure to show an amount in controversy sufficient to give the court jurisdiction might not render the bill demurrable (*Gamber v. Holben*, 5 Mich., 331), yet it might be sufficient reason for the court declining to entertain the case when the remedy at law is entirely adequate. And as in respect to these alleged profits, no more than as to the salaries, is any relief sought except a recovery of moneys, on grounds which a court of law is quite as competent to investigate as a court of equity, we are of opinion that the bill was properly dismissed.

The decree appealed from will be affirmed, with costs.

CAMPBELL and GRAVES, JJ., concurred.

MARSTON, J., did not sit in this case.

WRIGHT v. PEET.

Bela Wright v. Rolla A. Peet and another.

Mortgages: Defense: Fraud: Laches. One who gave a purchase money mortgage for lands which he had purchased and gone into possession of five years before, cannot defeat or reduce the amount of such mortgage upon a showing that he was defrauded in the purchase by false representations regarding the lands and the crops thereon, where the deception complained of was such that he must have discovered it before giving the mortgage. A party seeking to avoid his contract on the ground of fraud is bound to move promptly.

Heard and decided April 11.

Appeal in Chancery from Kent Circuit.

Taggart & Wolcott, for complainant, were stopped by the court.

G. Chase Godwin, for defendants.

COOLEY, CH. J:

The defendant seeks to reduce the amount of a purchase money mortgage by showing that he was defrauded in the purchase by false representations regarding the lands and crops thereon. The purchase was made in 1867, and the mortgage was not given until 1872. As defendant had possession of the premises immediately after the purchase, he discovered at once any deception that had been practiced upon him, and his duty was to make prompt complaint. So far from doing so, he made no complaint until after the giving of the mortgage. That was too late.—*DeArmand v. Phillips*, Walk. Ch., 186; *Whiting v. Hill*, 23 Mich., 399.

Some question is made regarding an item of expenses included in the computation of amount due, but this seems to have been agreed upon by stipulation.

Decree affirmed.

The other Justices concurred.

JONES v. BEESON.

James M. Jones and another v. Strother M. Beeson.

Evidence: Matters equally within knowledge of deceased. In a suit brought by an administrator questions relating to payment made after suit brought or at the commencement of suit, or to a payment made to agents of the deceased, are not within the provision of the statute (*Comp. L. 1871, § 8968*) excluding evidence of matters equally within the knowledge of the deceased.

Evidence: Matters equally within knowledge of deceased. Questions, in order to fall within that objection, must be distinctly aimed at such matters as appear affirmatively to have been within the knowledge of the deceased; and in case of questions that relate to matters that may or may not have been known to the deceased, the proper course, on objection being made, is to require them to be so limited as to avoid the difficulty.

Submitted on briefs April 3. Decided April 17.

Error to Berrien Circuit.

This suit was brought in justice's court by defendant in error, as administrator of the estate of William B. Beeson, deceased. The defense having been excluded by the justice, judgment passed for the plaintiff, and defendants removed the cause by *certiorari* to the circuit, where the judgment of the justice was affirmed. Defendants thereupon brought error.

Cholwell Knox, for plaintiffs in error.

E. Bacon, for defendant in error.

CAMPBELL, J:

Suit was brought before a justice of the peace, upon a note in favor of William B. Beeson, deceased, and on the defense it was sought to introduce evidence of payment by one of the defendants. Several questions were put and all ruled out. One of them related to payment made since suit brought or at the commencement of suit, and one was directed to a payment made to agents of the deceased. All the questions were ruled out as relating to matters equally within the knowledge of witness and decedent.

JONES v. BEESON.

These questions, in order to fall within that objection, should be distinctly aimed at such matters as were objectionable. No question on the record appears affirmatively to have been of such a character. Some of them might possibly have related to such transactions, and might, upon an objection, have been required to be limited so as to avoid the difficulty. Several questions could not possibly have been within the prohibition of the statute.

The court below should not have affirmed the judgment.

The judgment of the circuit court, affirming the justice's judgment, must be reversed, and the judgment of the justice reversed, with costs of all the courts.

The other Justices concurred.

Adonijah E. Upton v. James Kennedy.

Constitutional law: Legislative authority. It is a sound rule of policy, no less than of courtesy, that a court shall abstain from questioning the validity of legislation until it becomes absolutely necessary in the decision of a pending controversy.

Special finding: Conclusion of law: Finding of facts. Where a case rests upon exceptions to conclusions of law in a special finding, the exceptions must stand or fall by the finding of facts.

Tax-titles: Finding of facts: Construction: Excessive levy. A finding upon the validity of tax conveyances, which shows that the sum of sixteen hundred and sixty-three dollars and thirty-seven cents, for county taxes, and five hundred dollars for township contingent fund, were duly authorized to be raised, and which further finds "that one thousand dollars was raised on the roll of said township" for the year in question, but fails to state for what, is held to be open to the construction that the town raised less money than was authorized, instead of more.

Taxation: Township taxes: Lawfully voted: Board of supervisors: Certificate. Where a sum of money has been lawfully voted to be raised by taxation for township purposes, the failure of the board of supervisors to direct its levy would not invalidate the action of the supervisor in spreading it upon his roll.

Township expenses: Finding of facts: Excessive levy. The term "township expenses" is usually applied to the ordinary expenses of township government, and as commonly used would not cover many sums which it

UPTON v. KENNEDY.

might be proper and even necessary that the township should raise for local purposes, as, for instance, school taxes, the mill tax for school purposes, or a tax to pay a judgment against the township; so that a finding that one thousand dollars of township taxes had been levied, and that five hundred dollars had been voted as a contingent fund, and that there was "no other record of any further sum being raised for township expenses" does not necessarily show that the levy was excessive.

Return of township collector: Signature: Verification. A return of the township collector, of the failure to pay the taxes, which is neither signed by him nor verified by his oath, is held to be unofficial and of no legal value.

Tax deeds: Statute construed: Sales: Return. It is too broad a construction to put upon the statute (*Comp. L. 1871, § 1129*) to hold that whenever a deed appears to have been given for taxes some portion of which were legal and are not shown to have been paid or otherwise discharged, the title under the deed must be upheld. Some things besides a deed must necessarily be assumed as having been within the implications of the legislative requirement. The sale, to be upheld, must be understood to be a sale made as required by law, and effectuated by such a deed as the law contemplates. And there must be a lawful return to support the statutory sale and conveyance.

Tax deeds: Sales: Return: Statute construed. The real purport and effect of this statute is, that the sale shall not be void because one of several taxes is illegal, or has been discharged, nor because a return cannot be found in the proper office, unless it is shown the return never existed.

Taxation: Statute construed: Sales: Return. The purposes had in view by this legislation were: (1) To provide that no error or irregularity in mere matter of form should invalidate a tax proceeding; (2) To do away with the legal rule which the decisions had previously established, that a sale for several taxes, one of which was illegal or had been paid, should be void; and (3) To abolish the rule that when a record was not to be found in the proper office it must be accounted for before it can be assumed that it ever existed. For the first purpose the statute was not necessary, but the other two could not be accomplished without legislation.

Taxation: Tax deeds: Return: Constitutional questions. The return of the township collector having been shown in this case to have been a mere nullity, the question argued by counsel, of the constitutional power in the legislature to make a tax deed conclusive evidence of title, where it appears to have been given on a sale of lands for taxes, some of which were valid and had never been paid or in any manner discharged, is not necessarily involved, and is therefore not considered.

Heard April 3. Decided April 17.

Error to Osceola Circuit.

Gray & Luton, for plaintiff in error, argued that the tax deeds for 1869 were void, for the reason that a town tax of one thousand dollars was raised, when only the sum of five hundred dollars was authorized to be spread upon the roll for the year 1869, as shown by the records of the township: *Case v. Dean*, 16 Mich., 12; *Lacey v. Davis*, 4 Mich., 140; and that the tax

UPTON v. KENNEDY.

deeds for 1870 and 1871 were void, because the returns of the town treasurers for those years were not signed or sworn to, as required by the statute: *Sess. L. 1869, Act No. 169, § 55*; and because there is no official evidence on file in the county treasurer's office that the taxes for those years had not been paid on the lands in question: *Sharp v. Johnson, 4 Hill, 92; Thatcher v. Powell, 6 Wheat., 119; Callerton v. Douglass, 17 Ind., 213*; and that section 164 of said act does not preclude the plaintiff from showing said deeds to be void: *Hart v. Henderson, 17 Mich., 218; Moser v. White, 29 Mich., 59; Mullen v. Benedict, 8 Penn. St., 169; Com. Bank v. Woodside, 14 Penn. St., 404*; that without a sworn return by the town treasurer, the county treasurer lacked jurisdiction to sell said lands.

Wells & Morse, for defendant in error.

Under the statute (*Comp. L. 1871, § 1129*) unless a showing was made that the county tax was illegal, there could be no attack upon the tax deeds for errors in the other taxes, without a showing that the county tax, being legal, had been tendered to the proper officers; and no such showing was made. These taxes are wholly distinct in their object, destination and amount, from the others: *29 Mich., 247*. There was no difficulty in the way of the plaintiff tendering these legal taxes to the proper officers, and we claim that without it the tax-titles could not be invalidated for any cause. See *15 Mich., 257; 16 Mich., 176; 24 Mich., 170*. The statute in Wisconsin requiring a deposit of the amount of the taxes due before the title could be attacked, it was held in *Wakely v. Nicholas, 16 Wis., 593*, that this was a competent provision. See also *19 Wis., 620*. For decisions under a similar statute in Iowa, see *Eldredge v. Kuehl, 17 Iowa, 172; Parker v. Sexton, 29 Iowa, 423; Hurley v. Powell, 31 Iowa, 64; Rhodes v. Sexton, 33 Iowa, 540*; and see *Cooley on Taxation, 373*.

Plaintiff is bound by the facts found, and can raise no question on any fact not found. The want of a certificate from the clerk of the board of supervisors would not invalidate any taxes lawfully voted for township purposes: *Robbins v. Barron, 33 Mich., 124*.

The presumption under the statute would be, even though no return of the town treasurer could now be found, that it had been duly made and attached to the roll; it would be only a formal matter, not affecting the merits, and therefore could not render the tax deeds invalid under the statute: *Comp. L. 1871, § 1129; 26 Mich., 245; 19 Wis., 618*.

UPTON v. KENNEDY.

As to the validity of the provision of the statute making the tax deed conclusive evidence of title where any of the taxes were valid and had not been paid, they cited: *17 Wis.*, 565; *19 Wis.*, 615; *29 Iowa*, 356; *37 Iowa*, 93, 536; *32 Iowa*, 461; *31 Iowa*, 125; *35 Iowa*, 234, 505; *33 Iowa*, 540; *38 Iowa*, 141; *13 S. & B.*, 360; *17 Penn. St.*, 420; *9 Ib.*, 270; *33 Me.*, 76; *18 Ohio*, 400.

COOLEY, CH. J :

Counsel in this case have argued a question of constitutional power in the legislature to make a tax-deed conclusive evidence of title where it appears to have been given on a sale of lands for taxes, some of which were valid and had never been paid or in any manner discharged. We are of opinion, however, that the question does not necessarily arise in this case; and we are not disposed to consider it as merely an abstract question. It is a sound rule of policy, no less than of courtesy, that a court shall abstain from questioning the validity of legislation until it becomes absolutely necessary in the decision of a pending controversy. When the necessity arises, the court must apply the law that controls the case, whether it be statute or constitution; but a conflict between the statute and the constitution is not to be inquired into until it is found to affect some interest involved in a suit or proceeding which the court is required to pass upon.

The controversy in this case involved the validity of tax conveyances for several parcels of lands, purporting to be made for the taxes of the years 1869, 1870 and 1871. The defendant claimed title under these conveyances. The case comes to us on a finding of facts by the circuit judge, and by this finding the exceptions to his conclusions of law must stand or fall.

As regards the taxes for the year 1869, the circuit judge finds as follows: "I find that the county clerk of Osceola county, immediately after the annual session of the board of supervisors of said county for the year 1869, delivered to the supervisor of the township of Hersey, in which town-

UPTON v. KENNEDY.

ship the lands described in the plaintiff's declaration are all situated, that year a certificate certifying under *section 32 of act 169 of the Session Laws of 1869*, the amount of county taxes to be raised in said town for that year at the sum of sixteen hundred and sixty-three dollars and thirty-seven cents; township tax at five hundred dollars. No state taxes were raised in Osceola county that year, and that no school or highway taxes were certified by said clerk under the said section. I find by the records of the town board for the year 1869 of the said township of Hersey, that at the annual township meeting held April 5, 1869, the electors voted to raise \$500 for a contingent fund; and I also find from the records of the board of supervisors at the annual session of 1869 that the said board voted that the township of Hersey be allowed to raise five hundred dollars for a contingent fund, and I find no other records of any further sum being raised for township expenses; and that one thousand dollars was raised on the roll of said township; and that the lands described in the said plaintiff's declaration were duly assessed for their proportion of said tax. I find no claim or proof offered or given of any irregularity in the county tax assessed and levied for said year 1869. I find no returns of overseers of highways for the year 1869 of road districts in said township of Hersey, in which the lands above described were located, now to be found in the office of the supervisor of said township."

These are all the facts which are found regarding the tax for 1869. It is to be regretted that they are not stated with a little more fullness and precision, and that on some points they are ambiguous. Thus, it is found "that one thousand dollars was raised on the roll of said township," but it is not stated for what. Now as the two sums of sixteen hundred and sixty-three dollars and thirty-seven cents and five hundred dollars were duly authorized to be raised, the finding is open to the construction that the town raised less money than was authorized, instead of more. Counsel on both sides, however, have assumed that the one thousand

UPTON v. KENNEDY.

dollars were levied for some purpose to be accomplished within the township; and this we shall assume was the meaning of the circuit judge.

Treating this as a township levy, the defect in the plaintiff's case is, that it does not appear with sufficient certainty that the levy was unauthorized. The circuit judge finds that only five hundred dollars was certified by the clerk of the board of supervisors to the supervisor of the township as having been authorized for township purposes; but in *Robbins v. Barron*, 33 Mich., 124, it was decided that if a sum had been lawfully voted, the failure of the board of supervisors to direct its levy would not invalidate the action of the supervisor in spreading it upon his roll. The judge also finds that five hundred dollars was voted for township contingent expenses, and that he finds "no other record of any further sum being raised for township expenses." Now this term, "township expenses," is usually applied to the ordinary expenses of township government, and as commonly used would not cover many sums which it might be proper and even necessary that the township should raise for local purposes. As an illustration, school taxes would not be spoken of as taxes for township expenses, whether levied upon districts or upon the township at large; and a mill tax for school purposes was at this time required to be levied by the supervisor without any action of the township or township board directing it.—*Comp. L.* 1857, § 2350. The same might be true of a judgment against a township.—*Ibid.*, § 4917. But a tax to pay a judgment would hardly be considered a tax for "contingent expenses," or for "township expenses," and certainly would not be regarded as covered by a vote for those purposes so long as no vote for raising it is required. We are, therefore, of opinion that it does not sufficiently appear from the finding that an excessive levy was made.

The defect principally relied upon in the case of the tax-sales for 1870 and 1871 was that the township collector's return of the failure to pay the taxes was neither signed

UPTON v. KENNEDY.

by him nor verified by his oath. We think the counsel for the plaintiff is correct in the position that such a paper is unofficial and of no legal value. But the defendant relies upon § 1129 of the *Compiled Laws of 1871*, which was in force at the time these taxes were assessed and sales made, and which reads as follows:

“(1129) SEC. 163. No general or special tax authorized to be raised by the laws of this state, and which shall be assessed upon any property in any township or ward within the state, shall be held illegal or invalid for want of any matter of form in any matter or thing not affecting the merits of the case, and which shall not prejudice the rights of the party assessed; nor shall any sale of property for non-payment of the taxes thereon be invalid unless it shall be made to appear that the legal taxes, costs and charges were tendered to the proper officers within the time limited by law for the payment of all such taxes; or, in case of the sale of real estate, unless it shall be made to appear that all legal taxes assessed upon such real estate, together with all legal costs and charges thereon, were tendered to the officer authorized to receive such redemption money within the time limited by law for the redemption thereof; and all taxes assessed upon any property in this state shall be presumed to be legally assessed until the contrary is affirmatively shown; and no sale of real estate for non-payment of the taxes thereon shall be rendered invalid by showing that any paper, certificate, return or affidavit required to be made and filed in any office is not found in the office where the same ought to be filed or found; but, until the contrary is proven, the presumption shall be, in all cases, that such certificate, paper, return or affidavit was made and filed in the proper office.”

If we correctly apprehend the position of defendant's counsel, it is this: that under this section, wherever a deed appears to have been given for taxes some portion of which were legal and are not shown to have been paid or otherwise discharged, the title under the deed must be upheld,

UPTON v. KENNEDY.

But if this be the view taken of this section, it is certainly too broad. Some things besides a deed must necessarily be assumed as having been within the implications of the legislative requirement. For instance, if the auditor general had given a deed not based on any sale whatever, it would probably be conceded that his action was wholly without jurisdiction and void, for it is only sales that the statute assumes to support. So the action of the county treasurer would be void if without authority of law he should assume to execute a tax conveyance. The sale, to be upheld, must therefore be understood to be a sale made as required by law, and effectuated by such a deed as the law contemplates. But we also think this section itself contemplates that there shall be a lawful return to support the statutory sale and conveyance.

If when the validity of a sale and conveyance is in question nothing could be considered beyond the legality of some one or more of the taxes and the fact of its remaining undischarged, it would be manifest that the compliance of the collector's return with the statute, or the fact of any return at all, would be wholly immaterial, since in that view of the statute, if all the taxes were unwarranted or had been discharged, the sale must in every instance fail, and if any one was legal and remained undischarged the sale must in every instance be sustained. But we think the legislature have very plainly shown by the language employed in this section that it was not their purpose to establish a rule so sweeping. When in the very provision by which they propose to strengthen tax-titles they establish a rule of evidence regarding certain preliminary steps leading to a sale, it must be assumed that the rule is not a mere idle and unnecessary one, but that it is established because in some contingencies it may have an important office to perform. But what office can a rule of presumption in favor of the existence of a return have to perform, when the validity of a tax sale is in question, unless the sale itself may depend upon it?

The statute says that no sale shall be rendered invalid

UPTON v. KENNEDY.

by showing that any paper, certificate, return or affidavit is not found in the office where it ought to be filed or found, but until the contrary is proved the presumption shall be that it was duly made and filed. What papers, certificates and affidavits were had in view, we need not inquire, but it is certain that the return was one, because that was mentioned; and the implication is conclusive that the validity of the sale was supposed to depend upon it. To hold otherwise would be to treat this provision as meaningless and idle. And this part of the section must necessarily in some degree qualify what precedes it. The sale shall not be void because one of several taxes is illegal or has been discharged, nor because a return cannot be found in the proper office, unless it is shown the return never existed. This is the effect of the provision.

A careful consideration of this section seems to us to render very clear the purposes had in view by the legislature, and they may be stated as follows: (1) To provide that no error or irregularity in mere matter of form shall invalidate a tax proceeding; (2) To do away with the legal rule which the decisions had previously established, that a sale for several taxes, one of which was illegal or had been paid, should be void.—*Lacey v. Davis*, 4 Mich., 140; *Case v. Dean*, 16 Mich., 12; and, (3), To abolish the rule that when a record is not to be found in the proper office it must be accounted for before it can be assumed that it ever existed.—*Hall v. Kellogg*, 16 Mich., 135. For the first purpose the statute was not necessary, but the other two could not be accomplished without legislation.

In this view of the statute we are relieved from any consideration of the constitutional question, because there is testimony regarding the return, and it is shown to have been no return at all. The titles for 1870 and 1871 are therefore proved to be invalid. But as the tax conveyance for 1869 is not affirmatively shown to have been unwarranted, and that alone would be sufficient to support the judg-

 UPTON v. KENNEDY.

ment, the judgment must be affirmed, with costs. The record will be remanded for further proceedings under the statute.

The other Justices concurred.

 Willard J. Bowen v. Jason T. Culp.

Executions: Receiptors: Joint liability: Non-joinder: Plea in abatement.

In an action against one of three receiptors upon a receipt given to an officer for goods he had seized upon executions, and conditioned for a delivery of the goods to the officer on demand or in default thereof to pay the executions, an objection that the receipt was improperly admitted under the declaration as evidence of a contract with defendant, is held not well taken, where the declaration did not disclose a joint liability and the defendant failed to plead the non-joinder in abatement.

Receiptors: Offer to turn out the property: Executions: Return day: Sales.

An offer to turn out the property after the return day of the executions, and the refusal of the officer then to accept the same, is no defense to an action on the receipt; as the officer under the statute (*Comp. L. 1871, §§ 5434-5*) could not sell the property after the return day of the executions, he very properly refused to receive it then.

Receiptors: Demand: Officer: Authorized person. A demand made by any other person properly authorized by the officer to make it, would have the same force as a demand by the officer in person, to fix the liability of the receiptor in case of his failure to comply with it.

Receiptor: Promise to pay executions: Statute of frauds: Evidence: Charge to the jury. The reply of the receiptor to a demand for the return of the goods for which he receipted, that he would pay up the executions, was admissible in evidence to show under which clause of the receipt he chose to be bound; and where no recovery was sought or claim based upon such oral promise alone, it was not error that the court declined to instruct the jury that such oral promise was void under the statute of frauds.

Heard April 3. Decided April 17.

Error to Branch Circuit.

Loveridge & Barlow, for plaintiff in error.

John B. Shipman, for defendant in error.

BOWEN v. CULP.

MARSTON, J:

In February, 1875, Stephen Buhrer recovered two judgments in justice's court against Mary E. Elliott, upon which executions were issued and delivered to Gilcrest, who, by virtue thereof, levied upon a quantity of liquors then the property of the defendant in said suits. On the day of the levy a receipt was given the officer for the property seized, signed by Mary E. Elliott and Bowen and McGowan, conditioned to deliver it to the officer on demand or in default thereof to pay him the damages, costs and fees in the executions. The action in this case was brought against Bowen upon this receipt, alleging that a demand had been made upon Bowen for the property, and his refusal to deliver the same, whereby he became liable to pay the amount of the executions. The plaintiff recovered a judgment, which defendant now seeks to have reversed and a new trial granted.

It is first objected that the receipt was improperly admitted under the declaration as evidence of a contract with Bowen.

The declaration did not disclose a joint liability, and plaintiff in error did not plead the non-joinder in abatement. This objection, therefore, was not well taken.—*Ballou v. Hill*, 25 Mich., 205. It was next urged that plaintiff in error offered to turn out the property on which the executions were levied after the return day of the executions. Under sections 5424 and 5425, 2 Comp. L., p. 1602, the officer could not sell this property after the return day of his executions; he very properly, therefore, refused to receive it after the return day.—*Burk v. Webb*, 32 Mich., 182.

It is next claimed that the officer did not demand the property, and no demand having been made, defendant was not liable. There is no question but that a demand was made in time by Mrs. Elliott's attorney, who was authorized by the officer to make it. We cannot agree with the position taken by counsel for plaintiff in error that no one

BOWEN v. CULP.

but the officer in person could make the demand. The officer, or any person properly authorized by him, had a right to demand the goods, and a failure to comply with such demand would render the receptor liable. At the time this demand was made, Bowen declined to deliver the goods, expressing a desire to retain them for another purpose. He added that he would fix up the executions and pay them, and it is urged that this was a verbal promise to pay the executions and was void under the statute of frauds, and that the jury should have been so instructed. There are several answers to this. No right to recover was based or claimed upon such statements. The evidence was admissible as a part of the conversation which took place at the time demand was made for the property. It was optional with Bowen to deliver the property or pay the executions. A demand having been made, his reply thereto that he would pay the executions was admissible to show under which clause of the receipt he had concluded to be bound. The charge upon this part of the case was sufficiently guarded, and as we discover no error, the judgment must be affirmed, with costs.

The other Justices concurred.

Louren Carpenter v. Elijah S. B. Vail and another.

Line fences: Penalties: Conditions precedent: Finding of facts. It is incumbent upon a party attempting to enforce the penal liability allowed by the statute (*Comp. L. 1871, §§ 773-9*) as to building line fences between adjoining proprietors, to show that in substance all the conditions have arisen which the statute contemplates as precedent to it; and where judgment is given on a special finding, the finding must show the existence of the requisite conditions; and one of the conditions to the liability to pay double the cost of building such line fence is, that the fence viewers in writing under their hands assigned a reasonable time for the party charged as delinquent to make the fence.

CARPENTER v. VAIL.

Line fences: Adjoining proprietors: Occupant: Husband and wife. An occupant of premises, to be held liable under the statute for the building of line fences, must be one in possession and having the use and control of the premises in such manner that he has a lawful right, if he so wills, to fence voluntarily; and one who merely lodges with his wife on premises belonging to the wife and of which she is the exclusive manager, and who carries on business by himself elsewhere, and has no more legal right to fence or to interfere with the matter than a stranger, cannot be made liable for line fences built by an adjoining proprietor.

Submitted on briefs April 4. Decided April 17.

Error to Berrien Circuit.

W. R. Lyon and E. Bacon, for plaintiff in error.

Potter & Potter, for defendants in error.

GRAVES, J:

This litigation originated in proceedings under *ch. 14, C. L.*, concerning fences. *Section 778* provides as follows: "Where any lands belonging to different persons in severalty shall have been occupied in common without a partition fence between them, and one of the occupants shall be desirous to occupy his part in severalty, and the other occupant shall refuse or neglect, on demand, to divide with him the line where the fence ought to be built, or to build a sufficient fence on his part of the line when divided, the party desiring it may have the same divided and assigned by two or more fence-viewers of the same township in the manner provided in this chapter."

The next section provides for carrying out and enforcing the rights and duties so marked out, and is as follows:

"Upon the division and assignment, as provided in the preceding section, the fence-viewers may, in writing under their hands, assign a reasonable time for making the fence, having regard to the season of the year, and if either party shall not make his part of the fence within the time so assigned, the other party may, after having completed his own part of the fence, make the part of the other and recover therefor double the ascertained expenses thereof,

CARPENTER v. VAIL.

together with the fees of the fence-viewers, in the manner provided in this chapter."

Vail and Gordon, claiming to have built a strip of partition fence which Carpenter, as adjoining occupant, had become bound to build and ought to have built under these provisions, sued him before a justice to recover double the ascertained expense, etc., and were allowed to recover. Carpenter appealed and the cause was tried by the circuit judge without a jury.

The judge made a finding and entered judgment against Carpenter for double the expense of the fence. Several objections are taken to the proceedings which it is not necessary to notice.

The general question is, whether the finding justifies the judgment; and that it does not, seems clear. Where one attempts to enforce the penal liability allowed by this statute, it is incumbent upon him to show that in substance all the conditions have arisen which the statute contemplates as precedent to it, and in case judgment is given on a special finding, the finding must show, as a special verdict would, the existence of the requisite conditions, and if it do not, it cannot be aided by reference to the testimony which may have been given. Now, one of the conditions essential to the liability charged here is, that the fence-viewers, in writing under their hands, assigned a reasonable time for Carpenter to make the fence, and yet this is not found at all. Evidence appears to have been given on the subject, but no finding was made on it. But there is another question of greater moment. The evidence tended to show that Carpenter did not own the adjoining land, and had no power or control over it or connection with its use or management. He claimed that his wife was owner and exclusive manager, and that he was merely a lodger on the premises as consort of the owner, and that he carried on business by himself away from these premises. The judge refers to the evidence on this subject and the claim of Carpenter, but makes no distinct finding as to occupancy. The finding is barely

CARPENTER v. VAIL.

that Carpenter had his home on the place; that it was called and regarded as his, and that the equities were against him. Occupancy, in the sense of this provision, and by which one may be made liable to an indefinite amount for fence building by compulsory proceedings instituted by another, means something more than boarding or living upon the premises. A party may have his home on a place and still have no right or power to place any fence or other erection upon it, and the statute was not intended to apply to a person having no lawful right to make erections. To be an occupant in the sense of this statute, one must be in possession and have the use and control of the land. His connection with the property must be such that it would be proper and consistent for him, if he so willed, to fence voluntarily. According to the case, such was not the situation of Carpenter. He had no more legal interest in the fencing, and no more legal right to fence or interfere on the subject, than any stranger. He carried on business by himself elsewhere, and simply sojourned on the premises in his character of husband.

This is a fatal defect in the case.

The judgment must be reversed, and one entered here for Carpenter, with the costs of both courts.

The other Justices concurred.

Isaac N. Gage v. Lucy O. Gage.

Deed: Delivery: Husband and wife. Where a husband has executed a deed to his wife, for the purpose of having her exhibit it to his creditor to induce him to grant an extension, and has deposited it with his other papers in the house where she had access to it, to make use of it for the purpose for which it was made, to show ownership in herself, the legal control of it must be regarded as delivered to her; and this constitutes a delivery in law.

GAGE v. GAGE.

Deed: Delivery: Case made by the bill. The complainant, having planted himself on the non-delivery of the deed, must fail in his suit to set aside the conveyance when delivery is made out.

Deeds: Illegal purpose: Fraud: Delaying creditors. A party who executes a deed for the illegal purpose of delaying his creditor in the collection of his debt, must bear the consequences if the party he trusts in his unlawful attempt defrauds him. Courts will not occupy themselves with adjusting equities between wrong doers.

Heard April 4. Decided April 17.

Appeal in Chancery from Eaton Circuit.

I. D. McCutcheon and *I. M. Crane*, for complainant.

Dart & Shields, for defendant.

COOLEY, CH. J:

The complainant in this cause seeks to set aside and have cancelled a deed of lands made by himself to his wife, but which he alleges was never delivered as a conveyance. His case is, that on or about the 20th day of January, 1871, he executed the deed at the suggestion of his wife, for the purpose of exhibiting it to one Lapham, to whom he was at that time indebted, in order that, by means thereof, he might secure from Lapham further time for the payment of his indebtedness; that the deed was deposited with his other papers in his house after execution, but was subsequently, without his knowledge or consent, taken by his wife and put on record, and she now claims title under it. This is a substantial statement of complainant's claim as he makes it by his bill.

The testimony regarding the actual delivery of the deed by the husband to the wife is conflicting, but from all the evidence it is perfectly clear that whether the deed was actually placed in the wife's hands or not, it was deposited where she could make use of it for the very purpose for which it was made. The actual custody was as much in her as in him, and as it was understood that she was to make use of it on occasion to show ownership in herself,

GAGE v. GAGE.

the legal control must be regarded as delivered to her. And the act of the wife in taking the deed and placing it upon record, though it may have been without the husband's knowledge, was in itself no wrong, if delivery in fact or in law had previously been made.

We think a delivery in law is shown; and this is an end of the case. Fraud in procuring the deed is not relied upon, and complainant, having planted himself on the non-delivery, must fail when delivery is made out. He has executed a conveyance for the illegal purpose of delaying his creditor in the collection of his demand, and if the party he trusts in his unlawful attempt defrauds him, he must bear the consequences. Courts cannot occupy themselves with adjusting equities between wrong doers. When parties associate for an unlawful purpose they must calculate in advance the probabilities of bad faith towards each other, and must expect no assistance of the law against each other's frauds.

The decree dismissing the bill must be affirmed, with costs.

The other Justices concurred.

Lysander Brooks and another v. James H. Fairchild.

Deeds: Irregularities: Defects: Curative act of 1861. A deed executed in the state of New York before a commissioner of deeds in 1839, and to which is attached a proper clerk's certificate, made in 1841, certifying to the authority of such commissioner, and to the genuineness of his signature, and that the deed was executed according to the laws of New York, is held not open under the curative act of 1861 (*Laws of 1861, p. 16*) to objection that the deed had but one subscribing witness or that it was not acknowledged before the proper officer as provided by the laws in force at the time of its execution.

BROOKS v. FAIRCHILD.

Ejectment: Value of premises: Filing request nunc pro tunc: Discretion.

Where in ejectment testimony offered to prove the value of the premises was objected to on the ground that no request in writing for such estimation had been filed, and thereupon plaintiff's counsel, claiming one had been duly filed, asked and was allowed to file such request *nunc pro tunc*, it is held that in the absence of any denial on the part of defendants, that such request had actually been filed at the proper time, or of any claim that the filing of the same *nunc pro tunc* took them by surprise or that they were unprepared then to meet the same, or of any request for a continuance on account thereof, the discretion reposed in the trial court was not abused and that the course pursued was proper.

Evidence: School districts: Boundaries. Where in introducing evidence as to the legality of certain school taxes it becomes material to show that certain lands are within a particular school district, that fact may be proved by parol.

Special questions to the jury. The court on an ejectment trial having directed the jury to find a verdict for the plaintiff, submitting to them special questions propounded as to the value of the premises and of the improvements, the refusal to submit special questions proposed by defendants upon other subjects, is held not erroneous, for the reason that the answers would under the circumstances be immaterial under such a charge.

Heard April 4. Decided April 17.

Error to Van Buren Circuit.

Edward Bacon, for plaintiffs in error.

D. Blackman, for defendant in error.

MARSTON, J:

Defendant in error brought an action of ejectment, and obtained judgment therein, for certain lands in Van Buren county. It appears that the lands were patented by the United States May 1, 1839, to Samuel Sherwood and Joseph D. Beers. On the trial, plaintiff produced a deed purporting to have been signed by Sherwood and wife and Beers and wife November 25, 1839, conveying the land to William Kumble. There was but one subscribing witness to this deed. It purported to have been acknowledged December 16, 1839, in the city and county of New York, before Wm. H. Etting, commissioner of deeds. The clerk of said city and county, who was clerk of the court of common pleas

BROOKS v. FAIRCHILD.

of said city and county, April 23, 1841, certified that Etting was a commissioner authorized to take such acknowledgments, that this signature to said acknowledgment was the genuine signature of said Etting, and that the instrument was executed according to the laws of the state of New York. On the back of this instrument appeared an endorsement showing it to have been recorded in Van Buren county June 30, 1841.

Plaintiff introduced evidence to show that the grantee died August 31, 1866, leaving four children, who were his sole heirs at law; that this deed was found among his papers after his death, by one of his children, and that said grantee had paid the taxes upon these lands up to within a few years of his death; and tax receipts were introduced showing the taxes to have been paid from 1838 to 1858, inclusive, except for the year 1856. The plaintiff also introduced evidence to prove that the endorsement of record upon said deed was genuine, and also that the signatures of the grantors in said deed, Samuel Sherwood and Joseph D. Beers were the genuine signatures of said parties. There was no evidence given contradicting any of the testimony so introduced by the plaintiff. Plaintiff then offered in evidence the deed from Sherwood and Beers to Kumble, which was admitted, and a deed from the heirs of Kumble to plaintiff, executed and delivered before the commencement of this suit.

The assignments of error, forty-eight in number, cannot be separately considered. All the questions raised, of any importance whatever, can be considered and disposed of in a much more clear and satisfactory manner in the method we have adopted, than they could be if we should take up and examine each objection separately.

Whatever objections may have existed as to this deed not having had two subscribing witnesses at the time it was executed, and also because not acknowledged before the proper officer, as provided by the laws in force at the time of its execution, we think no such objections can be now

BROOKS v. FAIRCHILD.

urged. It appears that this deed was executed according to the laws of the state of New York, and that Etting, the commissioner, was authorized to take the acknowledgment of deeds by the laws of that state. The case comes clearly within the provisions of the act of 1861 (*Laws of 1861, p. 16*), and the deed was properly admitted in evidence.

After introducing the deeds in evidence, plaintiff introduced evidence to show that defendants were in possession of the premises, and he then offered to prove the value of the premises if no buildings or improvements had been made or waste committed. This was objected to because no such request in writing for any such estimation had been filed by the plaintiff. Plaintiff's counsel, then claiming that such a request had been filed, asked leave of the court to then file such a request *nunc pro tunc*. This was objected to, but allowed. It does not appear from the record that the fact of such a request having actually been filed was denied, or that defendants' counsel even claimed that to permit it to be filed during the trial would take him by surprise, or that he was unprepared to meet the same; nor was a continuance asked for on account thereof. Under such circumstances we think the discretion reposed in the court was not abused, and that the request of plaintiff was properly granted.

The plaintiff having rested, the defendants introduced in evidence five tax-deeds from the auditor general, covering the whole or portions of the land in dispute. One of these deeds was for the taxes of 1856, one for taxes of 1859, one for 1860, one for 1861, and one for 1862. And they also gave evidence to prove the value of the buildings and improvements. Plaintiff then gave evidence, which was not disputed, showing that the taxes, or a portion thereof, for which the lands had been sold and deeds given, as stated, were excessive and illegal. In introducing such evidence as to taxes raised in certain school districts, an objection was made by defendants' counsel, that no maps or documents were or had been offered to prove the organization or boun-

BROOKS v. FAIRCHILD.

daries of such school districts. We are of opinion that it is not necessary to introduce maps or documents to establish the fact that certain lands are within a particular school district, township, or other municipality, in a case like the present; that fact may be shown by parol.

Both parties having rested, counsel for defendants asked to have twenty-eight questions submitted to the jury, all of which were refused by the court except the twenty-seventh, relating to the value of the buildings and improvements, which was submitted and answered. The court instructed the jury to find a verdict for the plaintiff and also instructed them to answer the questions submitted by counsel for the respective parties relative to the value of the premises without improvements, and the value of the buildings and improvements. Under such a charge the other questions submitted by counsel for defendants became wholly immaterial. These questions are all covered by the previous rulings of the court, and the charge, so that if the latter was correct no error could have been committed in not permitting the jury to pass upon them, as the answers thereto, no matter how answered, could not have affected the verdict. The evidence in this case was not conflicting nor disputed. The tax deeds were not claimed to be valid. Most of the evidence had been addressed to the court to enable it to pass upon the admissibility of documentary evidence, and the finding of the jury in reference thereto could have no bearing upon or in any way affect the rulings previously made. The case was one, as submitted, where all the questions of any materiality or importance were legal ones, and had to be passed upon by the court, and where the court had a right, we think, to direct the jury to find for the plaintiff. Had the jury found otherwise it would have been the duty of the court to have set the verdict aside, so that we cannot see in what way the plaintiffs in error could be injured by the instruction given or the refusal to permit the jury to pass upon the questions rejected. The only questions of any importance related to the value of the

BROOKS v. FAIRCHILD.

premises and of the improvements thereon, and these were properly submitted and answered.

We discover no error in the record. The judgment must be affirmed, with costs, and the record remanded for further proceedings under the statute.

The other Justices concurred.

Harvey Gillam and others v. Agnes T. Boynton.

Findings of fact: Evidence: Conclusions of law. Where a cause was tried by the court without a jury and a special finding filed, the correctness of the conclusions of fact cannot be considered in a court of review, but must be assumed to have been warranted by the proofs; and if the findings of fact justify the judgment, it is immaterial whether specific legal conclusions are rightly drawn.

Special findings: Conclusions of fact. Every finding is the responsible act of the judge, and it is not important by what name it is called by him; if his mind has reached conclusions which involve questions of fact, they must prevail, even though mixed with legal inquiries, unless illegally reached.

Married women: Property purchased. A debt for property purchased is a valid liability in this state against a married woman.

Special findings: Married women: Purchase: Promissory notes. The findings of fact in this case showing that defendant was engaged in business for herself, that her husband had bought a safe on credit and had not paid for it and offered to return it to the vendors, with a proposition that his wife would, if they chose to sell it to her, give her note for an amount and at a time specified, which was the note in suit, that the vendors accepted this proposition and the note was sent accordingly, and that the husband acted in the matter only as agent for his wife and with her authority, and it being further found, though nominally as findings of law, that the vendors owned the safe and sold it to defendant in her own right and on her sole credit, and accepted this note in payment, the objection that the facts found do not support the judgment for plaintiffs, is held not well taken.

Heard April 4. Decided April 17.

Case made from Superior Court of Grand Rapids.

McLaren & Jennings, for plaintiffs.

Taylor & Eddy, for defendant.

GILLAM v. BOYNTON.

CAMPBELL, J :

Gillam recovered judgment in the court below against Mrs. Boynton, a married woman, upon her promissory note. She brings the case up for review on case made, and claims the judgment to be erroneous, on the ground that it does not properly appear that the note was given in any transaction relating to her own property.

The objections to the conclusions of the superior court seem to rest on some misapprehension. We have no power to consider the correctness or incorrectness of the judge's conclusions of fact, which we must assume to have been warranted by the proofs. And if those findings justify the judgment, it is not important whether any specific legal conclusions are rightly drawn.

The findings show that Mrs. Boynton was engaged in business for herself, and that her husband, who had bought a safe on credit and had not paid for it, offered to return it to the vendors, with a proposition that his wife would, if they chose to sell it to her, give her note for an amount and at a time specified, which was the same note sued on.

It is further found that they accepted the proposition and the note was sent accordingly, and that in this matter Boynton acted only as agent for his wife and with her authority. It is further found, nominally as findings of law, but really in legal effect as findings of fact, that the vendors owned the safe and sold it to Mrs. Boynton in her own right and on her sole credit, and accepted this note in payment. Every finding is the responsible act of the judge, and it is not very important by what name it is called. There is nothing in the record by which we are justified in revising his conclusions from the testimony. If his mind has reached conclusions which involve questions of fact, even though mixed with legal inquiries, they must prevail unless illegally reached. We have nothing before us to enable us to enter upon this inquiry, if we should imagine, as we do not, that the results are wrong. There

GILLAM v. BOYNTON.

is no bill of exceptions in the case, and there are no points of law raised which must not be determined by the right of the court below to render judgment on the findings set forth.

Upon such of them as have been above enumerated, the judgment was properly rendered for the plaintiff, who was holder of the note. It is well settled in this state that a debt for property purchased is a valid liability against a married woman.—*Tillman v. Shackleton*, 15 Mich. R., 457; *Campbell v. White*, 22 Mich. R., 185; *West v. Laraway*, 28 Mich. R., 465.

If this note was given for property actually sold to Mrs. Boynton on her own credit, all the other questions referred to in the findings become immaterial. No other judgment could be given than that which was given.

We have had some doubt whether this case is really in any condition to be examined at all. It is difficult to learn from the record what points are fairly before us. But as we can see no defect in the findings or judgment, we need not discuss the practice.

The judgment must be affirmed, with costs.

The other Justices concurred.

Ellen Lynch and others v. Michael Kirby and another.

Probate courts: Guardian and ward: Jurisdiction: License to sell: Petition.

A petition by a guardian for leave to sell real estate of his wards, which represents that the whole property of the wards consists of their interest in the two parcels of land, that over one hundred dollars is due and owing towards one parcel, that the other is burdened by a mortgage of fifty dollars, that the income of the property is inadequate to pay the debts, interest and taxes, and to maintain, support and educate the wards, is held sufficient under the statute to give the probate court jurisdiction to grant a license to sell.

LYNCH V. KIRBY.

Petition for license to sell: Jurisdiction. The fact that some of the statements in such petition were untrue, could have no bearing upon the question whether the allegations of the petition were sufficient to give jurisdiction.

Guardian's sale: Death of guardian: New guardian: Conveyance. Where a guardian, after receiving license to sell, making sale and reporting it to the court, and after the court has confirmed the sale and ordered conveyance, dies, and his successor is appointed and qualifies, the latter may properly be directed and required to complete the transaction by deed and receiving the purchase price. The act of conveyance is rather official than personal, and more a function of the place than a matter appropriated to any individual.

Guardian's sale: Oath before sale: New guardian. The oath required in connection with the sale would be inappropriate in such a case on the part of the new guardian.

Guardian's sale: Subject to mortgage: Bond: Discharge. Where a guardian's sale is made subject to a mortgage, and the mortgage is owned by the purchaser at such sale, there is no occasion to exact a bond from him to discharge it, since the effect of the transaction is to cancel the mortgage in his hands.

Appointment of guardian: Record: Consent of ward: Parol evidence. The record of the appointment of a guardian showing that the appointment was by consent of the ward, this record, when introduced in evidence in another cause, is not open to contradiction by parol.

Charge to the jury: Evidence: Signature. Where the guardian has testified that she did not execute the guardian's deed in question, and also that she did not sign the petition for her appointment as guardian, it is competent for the court, in submitting to the jury the question of the genuineness of the deed, to instruct them to take into consideration the fact that she likewise denied her petition, which she was shown by the records to have signed.

Ejectment: Joint plaintiffs: Declaration: Joint title: Undivided interest. Where a declaration in ejectment alleges a joint title in all the plaintiffs, it cannot be sustained by proof of title of part of the premises in one only of the plaintiffs; and the statute (*Comp. L. 1871, § 6331*) has no application to such a case, but contemplates a case where one or more of a greater number of plaintiffs are found to have a right to the possession of the entire premises.

Submitted on briefs April 5. Decided April 17.

Error to Wayne Circuit.

This is ejectment by the heirs of John Heffernin for the recovery of the "south equal undivided half" of certain land of which he died seized. The defendants claimed title under a guardian's sale. The judgment below was for defendants, and plaintiffs brought error.

Henry M. Duffield, for plaintiffs in error, as to the insufficiency of the petition for license to sell, cited: *Comp. L. 1871, § 4582; Ryder v. Flanders, 30 Mich., 336*; that the appointment of a new guardian to execute a deed of conveyance in pursuance of a sale of the land made by the previous guardian, and the

LYNCH v. KIRBY.

deed of such new guardian, were unauthorized and void: *Burt v. Cobb*, 9 Gray, 397; *Rorer on Judicial Sales*, 5, 144, § 363; *Gridley v. Phillips*, 5 Kans., 349; *Davis v. Brandon*, 2 Miss., 154; *Wortham v. Cherry*, 3 Head (Tenn.), 468; that there being no evidence that Ellza Heffernin's interest or share was sold at the guardian's sale, she should have been allowed to recover her share: *Comp. L. 1871*, § 6231.

Moore, Canfield & Warner, for defendants in error, as to the sufficiency of the petition, cited: *Comp. L. 1837*, § 3094; that the probate court had jurisdiction and authority to appoint a new guardian to execute the deed of conveyance in pursuance of the sale previously made by the former guardian: *Wagner v. Cohen*, 6 Gill, 102; *Halliburton v. Sumner*, 27 Ark., 460; *Sheldon v. Wright*, 7 Barb., 39; *Sypert v. McCowan*, 28 Tex., 635; *Rorer on Judicial Sales*, §§ 122, 362; *Evans v. Spurgin*, 6 Gratt., 107; *Heirs of Piatt v. Heirs of McCullough*, 1 McLean, 69; *Ossman v. Traphagen*, 23 Mich., 80; *Gridley's Heirs v. Phillips*, 5 Kans., 349; *Peterson v. Watkins*, 19 Ga., 153; that the instruction that Ellza Heffernin could not recover unless all the plaintiffs recovered was correct; that the familiar rule which requires parties suing jointly to show a joint right of recovery applies in this case; that the pleadings and proofs must agree: *Moore's Lessee v. Armstrong*, 10 Ohio, 11; *Toomey v. Pierce*, 42 Cal., 335; *S. C.*, 49 Cal., 307; *Murray v. Webster*, 5 N. H., 391; *May v. Slade*, 24 Tex., 208.

GRAVES, J:

First, The petition of the guardian for leave to sell was not fatally defective. It represented that the whole property of the wards consisted of their interest in the two parcels of real estate, and that over one hundred dollars was due and owing towards one parcel, whilst the other was burdened by a mortgage of fifty dollars then owned by John Kirby.

It further represented in substance that the income of the property was inadequate to pay the debts, interest and taxes, and maintain, support and educate the wards.

There was sufficient to give jurisdiction and enable the court to take cognizance of the matter.—§ 3076, *ch. 101*; and § 3094, *ch. 102*, *C. L. 1857*.

LYNCH v. KIRBY.

If any of the statements were in fact untrue, still the attaching of jurisdiction would not be thereby hindered.

Second, The guardian who received the license, at length made the sale and reported it to the court, and the court confirmed the sale and ordered conveyance.

The death of the guardian before conveyance could not and did not invalidate the sale. That was complete. The purchasers were entitled to conveyance, and no reason is perceived why the successor in the deceased guardian's place might not be directed to complete the transaction by deeding and receiving the price.

There is no express provision that conveyance must be made by the same person who as guardian effects the sale, and nothing is discovered which implies any necessity for such a rule.

On the contrary, it cannot be doubted but that such a regulation would often lead to great embarrassment and useless expense. Every sale not carried out by deed would necessarily fall to the ground in case of death, resignation or removal of the guardian. The act of conveyance is rather official than personal, and more a function of the place than a matter appropriated to any individual, and I think the probate court was warranted in authorizing and directing the new guardian to make the conveyance which was due in law and which the former guardian was at his death lawfully required to execute.

The new guardian succeeded to such of the duties of the place as remained unperformed.

The sale was already consummated, closed and established. It was a matter finished. What remained to be done was to give the deeds and receive and account for the money.

The oath required in connection with the sale would have been inappropriate on the part of the new guardian. It was not applicable to the situation and duties, and was properly omitted.

LYNCH v. KIRBY.

A bond was given, and in the same penalty as that which had been required for the bond of the deceased guardian, and it contained conditions proper to secure the duties required of the new guardian.

The sale to John Kirby was made subject to the Callaghan mortgage. But as Kirby owned the mortgage, there was no occasion to exact a bond from him to discharge it. The effect of the transaction was to cancel it.

Third. The record evidence on the back of Margaret Haley's petition, showing that Ellen Lynch, then Ellen Heffernin, consented to the appointment of Mrs. Haley as guardian in place of the deceased guardian, was not open to contradiction by parol in this case.

Hence, the question put to Ellen for the purpose of falsifying the certificate on the back of the petition was properly overruled.

Fourth. Mrs. Haley, the second guardian, having testified for the plaintiffs that she never executed the guardian's deed in question, stated, in answer to inquiry on cross-examination, that she did not sign the petition, produced from the probate court, for her appointment as guardian. In reference to this, the judge charged that in considering Mrs. Haley's denial of her execution of the deed, the jury should also regard the fact that she likewise denied her petition to be appointed guardian, and which was shown by the records to have been signed by her.

This was not objectionable. It was incumbent upon the jury to judge of the correctness of the witness' memory and decide upon her credit, and it was entirely proper for the court to direct their attention to the extent and application of her denials.

Fifth. Neither the notice of sale, the report of sale, nor the deed, mentioned Eliza Heffernin, and it not appearing that her interest was sold, the court was requested by plaintiffs' counsel to charge that in any event she was entitled to recover for one-fifth of the land sued for. This was refused.

LYNCH v. KIRBY.

It is now suggested by plaintiffs' counsel that the statute seems to have provided for just such a case, and he refers to § 6231, C. L. 1871.

The counsel is mistaken. This statute has no application. The only portion of the section which makes any approach to such a case is the second subdivision. But that contemplates a case where one or more of a greater number of plaintiffs are found to have a right to the possession of the entire premises sued for, and not to a case where one of several plaintiffs is entitled to a fractional part or interest.

As the case was shaped, it would seem that the ruling was correct. The declaration having alleged a joint title in all the plaintiffs, it could not be sustained by proof of title of part of the premises in one only of the plaintiffs. In addition to the cases cited in defendant's brief, see *Doe ex dem. Marston and others v. Butler*, 3 Wend., 149; *Gillett and others v. Stanley*, 1 Hill, 121; *Cutter and others v. Doughty and others*, 7 Hill, 305, 311.

This disposes of all matters of sufficient importance to be specially noticed, and no error is discovered.

The judgment must be affirmed, with costs, and the cause remitted for such other proceedings as may be proper.

The other Justices concurred.

John B. Horner and another v. Thomas Biggam.

Township drain commissioner: Appeals: Statute construed. Under the statute (Comp. L. 1871, § 1793) providing for an appeal to a justice of the peace from the action of the township drain commissioner, it is not every act or omission of the commissioner from which an appeal can be taken.

Certiorari: Township drain commissioner: Appeal: Jurisdiction. On certiorari to review proceedings on such appeal, the record not identifying any act of the commissioner as appealable, except it be action of which

HORNER v. BIGGAM.

the finding of the jury is by the statute (*S. L. 1875, p. 170, § 1782*) made *prima facie* evidence, and the appeal having been taken more than a month after the action of the jury, the time fixed by the statute within which an appeal may be taken being ten days only, it was held the appeal was without jurisdiction.

Township drain commissioner: Jury: Appeal: Time. The action of the commissioner upon the application to establish a drain being required under the statute to be taken before he issues a venire, an appeal complaining of the action of the commissioner in locating and establishing the drain, and which is not taken within ten days after the finding of the jury, must identify some subsequent action of the commissioner to which the appeal is applicable.

Unauthorized appeal: Affirmance: Certiorari: Errors that do not prejudice. The appeal being unauthorized, and the action had by virtue of it being nugatory, the judgment of affirmance of the original proceedings, which had by lapse of time become under the statute final and unappealable, could work no injury to the appellants, and will not be disturbed on *certiorari* on their behalf.

Submitted on briefs April 5. Decided April 17.

Certiorari to Justice of the Peace.

Joslin & Whitman, for plaintiffs in *certiorari*.

Albert Crane, for defendant in *certiorari*.

CAMPBELL, J:

This is a *certiorari* to review the proceedings had on appeal to a justice of the peace in Van Buren township, Wayne county, from the action of a township drain commissioner establishing a ditch. The plaintiffs in this case were the appellants, and were defeated on their appeal, and they now complain of the affirmance of the commissioner's action.

On looking into the record we have been unable to find any evidence of a valid appeal, or to ascertain what particular action of the commissioner is supposed to have been appealed from.

The statute (*C. L., § 1793*) provides that any person aggrieved by the action of a drain commissioner "in locating and establishing any ditch, drain or water-course, or in refusing to locate and establish any ditch, drain or water-course, or to act when applied to for that purpose, may

HORNER v. BIGGAM.

appeal to a justice of the peace of any township where such ditch or drain or any part thereof is situated, within ten days after the act complained of was done," etc.

It is not every act or omission of the commissioner from which an appeal can be taken. In the present case, the appeal claimed was from the determination of the commissioner in locating and establishing the ditch.

The statute contemplates the location and establishment of a ditch in advance of any apportionment of its expense on the lands benefited.—*C. L.*, § 1783, as amended in 1875, *L.* 1875, p. 170.

By § 1782 the commissioner is required under certain circumstances to summon a jury to pass upon the necessity of the work and assess damages. But he generally determines this himself. The determination of this jury is made "*prima facie* evidence of the establishment or location of such water-course, ditch or drain." There is no need of a jury except where lands cannot be had by voluntary cession.

In the present case the action of the jury was dated August 2, 1876, and the claim of appeal was not made until September 8, 1876. The action of the commissioner must have preceded this, as he issued the venire, and as no subsequent action of any kind is shown. If it did not precede the verdict, then there is nowhere in the record any reference whatever to any act of his in locating or establishing the ditch; and it would be somewhat unprofitable for us to attempt to determine the correctness of any proceeding until it is identified and shown to have been seasonably appealed from.

There is either no action identified as appealable, or it is that action of which law makes the finding of the jury *prima facie* evidence. This having occurred more than a month before the appeal was claimed, there was nothing for the justice to take jurisdiction of. As the proceedings were affirmed, no harm was done by the appeal, but the defeated appellants cannot ask relief on this writ, if they

 HORNER v. BIGGAM.

had no valid appeal. If the justice was wrong in receiving the appeal, it would have been a more serious wrong to have reversed proceedings over which he had no legal control.

The action of the justice being entirely nugatory, and having done no harm to the plaintiffs in *certiorari*, the writ will be dismissed, with costs. There are some important questions concerning the proper remedies in such cases, which on this record we cannot discuss.

The other Justices concurred.

 MORRIS OSBURN v. JAMES LOVELL.

Trespass to lands: Cutting timber: Treble damages: Evidence: Plea: General issue. In an action for trespass to lands and the cutting of timber, in which the plaintiff claims to recover treble damages under the statute (*Comp. L. 1871, §§ 6370-1*), the defendant is entitled under the plea of the general issue to give evidence that the trespass was involuntary and made under a *bona fide* claim of right, and is not required to give notice with his plea of his intention to introduce such evidence.

Statutory exceptions: Pleadings: Evidence. The rule that where one relies upon a statutory exception not contained in the enacting clause of the statute, he must by his pleadings bring himself within the exception, is not always a rule of pleading, but is sometimes a rule of evidence only; and it goes no further in any case than to require the party relying upon the exception to present the facts in such form as the case requires.

Evidence: Mitigation of damages: Pleading. Whatever in an action of tort would go in mitigation of damages may be given in evidence under the general issue.

Trespass: Declaration: Treble damages: Application of verdict. Under a declaration containing a count for a common-law trespass and a count for the statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute and proceed to render judgment for treble the damages returned.

Heard April 5. Decided April 17.

Error to Gratiot Circuit.

OSBURN v. LOVELL.

E. Gould and Gaylord & Hanchett, for plaintiff in error:

Notice was not necessary to authorize the testimony offered to show that the trespass was casual and involuntary, and that defendant had probable cause to believe the land was his own. The statutory trespass which authorizes treble damages involves willful, wanton or evil intent, and the simple act of cutting timber on another's land, without reference to the intent, does not present a case for imposing the penalty of trebling the actual damage done: *Wallace v. Finch*, 24 Mich., 255; *Russell v. Myers*, 32 Mich., 522. The establishing that the trespass was committed with such bad faith or blame as entitled the plaintiff to treble damages, was a part of his case, and the only plea required to deny that bad faith or blame and to put it in issue and authorize evidence to meet it, is the plea of the general issue: *Rawson v. Finlay*, 27 Mich., 268; *Kinnie v. Owen*, 1 Mich., 249; *Edwards v. Chandler*, 14 Mich., 471; *Wilson v. Wagar*, 26 Mich., 452; *Ingalls v. Eaton*, 25 Mich., 32. The testimony offered was testimony in mitigation of the damages claimed, and was proper for that purpose under the plea of the general issue, without notice: *Delevan v. Bates*, 1 Mich., 97; *Huson v. Dale*, 19 Mich., 17. There was no finding of facts to authorize the judgment for treble damages. The jury were authorized to find their general verdict under either count, and the judge could not say that they found it under one rather than the other. He could render no judgment except for the damages assessed by the jury: *Brooks v. Dalrymple*, 1 Mich., 145; *Russell v. Myers*, 32 Mich., 522.

Mitchel & Pratt, for defendant in error, argued that if a defendant has a cause of justification or excuse, he must plead it specially, and cannot give it in evidence under the general issue, and that the reason of this rule is, that it is necessary in order to prevent surprise and to enable parties to go to trial on equal terms: 1 *Waterman Tresp.*, 81-3; *Chilly Pl.*, 491-3-7; *Vanderkarr v. Thompson*, 19 Mich., 87; *Denwick v. Chapman*, 11 Johns., 132; *Babcock v. Lamb*, 1 Cow., 238; *Saunders v. Wilson*, 15 Wend., 338; *Van Buskirk v. Irving*, 7 Cow., 35; *Hall v. Fearnly*, 3 Gale & D., 10; *Walker v. Hitchcock*, 19 Vt., 634; *Austin v. Norris*, 11 Vt., 38; *Pearcy v. Waller*, 6 C. & P., 232; *Fuller v. Rounceville*, 9 Fost., 554; 3 *Starkie Ev.*, 1462; *Grouver v. Daniel*, 7 Blacks., 108; that no more is provable now under the general issue than was before the statute abolished special pleas, but that what was before required to be specially pleaded, must now be set out in a notice attached to the plea; that in trespass on lands the general issue puts in

OSBURN v. LOVELL.

issue the facts necessary to constitute the trespass, and under it the defendant may show title or possession in himself or those under whom he claims; but that when the act appears to be *prima facie* a trespass, any matter of justification or excuse must be pleaded or notice given of it: *Babcock v. Lamb*, 1 Cow., 238, and cases; *Bruch v. Carter*, 32 N. J. Law, 554; *Stow v. Scribner*, 6 N. H., 24; *Bradley v. Flewitt*, 6 Rich., 69; that the defendant may give in evidence under the general issue any matter that contradicts the allegations which the plaintiff is bound to prove, or shows that the act complained of is not in its own nature a trespass, for he cannot be a trespasser in exercising a right which the law gave him, nor be bound to justify when he does not *prima facie* appear to be a trespasser: *Rawson v. Morse*, 4 Rich., 127; *Johnson v. Howson*, 2 M. & R., 226; *Murray v. Webster*, 5 N. H., 391; *Helfeld v. Cent. R. R. Co.*, 6 Dutch., 571; *West v. Blake*, 4 Blackf., 234; that the statute in question indicates clearly that the exceptions specified, of casual and involuntary trespasses, are matters of defense purely; that in declaring on a statute, where there is an exception in the enacting clause, the pleader must negative the exception, but an exemption in a proviso to the enacting clause or in a subsequent section of the act is matter of defense and must be shown by the defendant: *Myers v. Carr*, 12 Mich., 63, and cases; *Lynch v. People*, 16 Mich., 472; *Tell v. Fonda*, 4 Johns., 304; *Spires v. Parker*, 1 Term, 141. On the point as to the application of the verdict to the statutory count, it is urged that the whole fight was on that count and the only proof in the case tended to support it; that all the exculpatory proof was excluded within the hearing of the jury, and the jury, as well as the court and the counsel, fully understood where the issue and real contest was; that it being apparent from the whole case that everything had reference to the statutory count, the inadvertence in not withdrawing the common-law count was not error; and that the action of the court in this regard was not prejudicial to the defendant if the other rulings were correct, for his very conduct on the trial was virtually a concession that plaintiff was entitled to treble the damages unless he could prevail upon the court to admit the testimony upon which error is here assigned.

COOLEY, CH. J :

The principal error relied upon in this case is, that the court, in an action for trespass to lands and the cutting of

OSBURN v. LOVELL.

timber, in which the plaintiff claimed to recover treble damages under the statute, refused to receive the evidence offered by the defendant to show that the trespass was involuntary, and made under a *bona fide* claim of right. The ruling was based upon the neglect of the defendant to give notice under his plea of the general issue of his intention to introduce such evidence.

The statutory provisions bearing on the case are *sections 6370 and 6371 of the Compiled Laws*, which read as follows:

"§ 6370. Every person who shall cut down or carry off any wood, underwood, trees or timber, or shall girdle or otherwise despoil or injure any trees on the land of any other person, without the leave of the owner thereof, or on the lands or commons of any city, township, village or other corporation, without license therefor given, shall be liable to the owner of such land, or to such corporation, in three times the amount of damages which shall be assessed therefor in an action of trespass, by a jury, or by a justice of the peace in the cases provided by law."

"§ 6371. If upon trial of any such action it shall appear that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that such wood, trees or timber were taken for the purpose of making or repairing any public road or bridge, judgment shall be given to recover only the single damages assessed."

The view taken by the plaintiff of this statute, and which seems to have been accepted by the court below, is this: that it makes the destruction of timber by a trespasser subject to a penalty of treble damages, but with a special exception of those cases in which the trespass was casual and involuntary or for road purposes. The rule of pleading is then referred to, that where one relies upon a statutory exception, not contained in the enacting clause of the statute, he must by his pleadings bring himself within

OSBURN v. LOVELL.

the exception.—*Attorney General v. Oakland Co. Bank*, Wal. Ch., 90; *Myers v. Carr*, 12 Mich., 63; *Lynch v. People*, 16 Mich., 472. But this is not always a rule of pleading; it is sometimes a rule of evidence only: it goes no further in any case than to require the party relying upon the exception to present the facts in such form as the case requires; and this may or may not be by special pleadings. The rule was treated as one of evidence merely, in *Myers v. Carr*, *supra*. Whether special pleadings are necessary, must be determined by other considerations and by the general rules of pleading.

The general issue at the common law puts in issue every thing necessary to be shown by the plaintiff to make out his case; but if the defendant in trespass relies upon justification or excuse, he must plead it specially.—*Gould Pl.*, ch. VI., § 38-58. Our statutory general issue is at least as broad as that at the common law.—*Kinnie v. Owen*, 1 Mich., 249; *Ingalls v. Eaton*, 25 Mich., 32; *Rawson v. Finlay*, 27 Mich., 268.

Now the defendant in this case relies upon neither a justification nor an excuse. If he cut the timber upon the plaintiff's land, it is admitted that the act is a trespass, neither justifiable nor excusable. All that is claimed by the defendant is, that the circumstances of the trespass were not such as to warrant imposing upon him penal consequences. It was held in *Delevan v. Bates*, 1 Mich., 97, that whatever in an action of tort would go in mitigation of damages might be given in evidence under the general issue; and in any view that can be taken of this case, the evidence offered by the defendant would have been receivable on that ground. But it is not without significance that the statute, when it permits a judgment for single damages only where it shall appear that the trespass was casual and involuntary, makes no allusion whatever to any special pleading or notice. The inference is forcible that none was meant to be required. It could certainly answer no impor-

OSBURN v. LOVELL.

tant purpose; for when the plaintiff sues for an aggravated trespass he must be supposed to come prepared to meet whatever would tend to show that it was not of that nature.

Another objection to this judgment is fatal. The declaration contained two counts: one for a trespass at the common law, and one for the statutory trespass. The jury returned a general verdict of guilty, upon which the judge proceeded to render judgment for three times the damages returned. Now, although the verdict established the fact of trespass, it found nothing more; and the finding could no more be applied to the one count than to the other. It cannot legally be known that the jury would have agreed on the count under the statute. The general finding is consistent with the fact that some of them may have agreed upon the aggravated trespass and some not. In any event, there was a trespass, which is all they have agreed upon.— See *Biggs v. Barry*, 2 Curt. C. C., 259; *Thayer v. Sherlock*, 4 Mich., 173. The verdict, therefore, only warranted a judgment for single damages.

The judgment must be reversed, with costs, and a new trial awarded.

The other Justices concurred.

Lydia J. Cadwell v. Leonard H. Randall and others.

Contracts: Construction: Conditions precedent: Performance. Sureties on a *ne exeat* bond in a divorce suit having, after decree granting alimony and continuing the *ne exeat* in force, and after their principal had committed a breach of the bond and suit had been brought on the same, entered into a contract with the complainant in the divorce suit, whereby they undertook, in case they should obtain leave to and should surrender their principal in their discharge as sureties, and should thereupon be discharged, and further, in case such principal should not perform such decree and should be committed for contempt or for want of bail, in consideration that the suit on the bond should be discontinued, and

CADWELL v. RANDALL.

which it was declared should be done on such surrender, to pay all the costs and fees of the jailer for the custody and keeping of said principal, and in case the principal should not eventually, and before being discharged, pay or perform the decree in the divorce suit, or satisfactorily secure the same, then to pay said complainant the amount for which they were sureties in the bond, it was held that the obtainment of the discharge of the sureties from liability on the bond, and the capture and surrender of their principal, and the discontinuance of the suit on the bond, and the enforcement of the decree against said principal if practicable, were conditions precedent to any liability on the part of said sureties to pay said complainant any thing upon said contract; and that a finding of facts which negatives performance of these several conditions precedent, is conclusive against any right of action in favor of said complainant on said contract.

Heard April 5. Decided April 17.

Error to Allegan Circuit.

Hughes, O'Brien & Smiley, for plaintiff in error.

Blair, Stone & Kingsley and *Norris & Uhl*, for defendants in error.

GRAVES, J :

Mrs. Cadwell filed a bill against her husband, George W. Cadwell, for a divorce. She caused a writ of *ne exeat* to be issued, on which he was arrested by the sheriff, and then liberated on bail.

The amount was five thousand dollars, and the defendant Randall and the decedent Foster became sureties that Cadwell would remain within the state. Subsequently the court decreed a divorce, and further, that Cadwell should pay certain sums by way of allowance. The decree also continued the *ne exeat* in force. But shortly after such decree, Cadwell went to another state, without leave of the court and contrary to the obligation of the bond.

The sheriff thereupon obtained leave to prosecute the bond, and accordingly impleaded Randall and Foster, the sureties upon it, in the circuit court for Kent county. Issue was joined and the cause noticed for trial, which, however, was postponed. This was in 1871, and whilst matters were in this shape, and on the 2d of November of that year,

CADWELL v. RANDALL.

Randall and Foster made a writing under their hands and seals, and which, as Mrs. Cadwell claims, was an agreement with her, and has, in the events which have taken place, invested her with a cause of action for a large amount. The present suit is based on that paper. It provided that in case Randall and Foster should obtain leave of the court of chancery to surrender, and should surrender, Cadwell in their discharge as sureties in the *ne exeat* bond, and they should be discharged, and in case Cadwell should not perform the decree in the divorce suit and should be committed for contempt or for want of bail, and in consideration that the suit at law on the bond should be discontinued, and which it was declared should be done on such surrender of Cadwell by Randall and Foster as before mentioned, that then said Randall and Foster should pay all the costs and fees of the jailer for the custody and keeping of said Cadwell; and further, in case Cadwell should not eventually, and before being discharged, pay or perform the decree in the divorce suit, or satisfactorily secure the same, then said Randall and Foster should pay to Mrs. Cadwell the amount for which they were sureties in the bond.

On the part of the defense the general issue was pleaded, with notice of set off.

The case was tried without a jury, and the judge made a special finding of facts. He found that Mrs. Cadwell had failed to establish a cause of action, and that the defense had made out a valid claim by way of set off, for five hundred and sixty-one dollars and ninety-four cents.

Judgment was accordingly given against Mrs. Cadwell for that sum, together with the costs of suit; and she complains that the facts do not sustain the judgment. Her position is, that by the finding a cause of action is made out in her favor on the writing executed by Randall and Foster.

We cannot take this view of the case. We think the finding distinctly negatives the existence of a cause of action in her favor on the covenant.

CADWELL v. RANDALL.

That instrument contemplated that in order to bring it into effective operation and fix Randall and Foster with liability under it, several distinct incidents would have to occur, and Randall and Foster were not bound for the bringing about of these incidents. Whether they would or would not occur was uncertain, and the writing so regarded them.

The obtainment of their discharge from liability on the bond by Randall and Foster, and the capture and surrender of Cadwell under the *ne exeat*, the discontinuance of the suit upon the bond, and the enforcement against him, if practicable, of the decree, were the important objects, and they were to precede any liability to pay Mrs. Cadwell any thing whatever.

Now the judge has found in substance and effect that Cadwell was never surrendered under the *ne exeat*, that Randall and Foster were never discharged from liability by the court, that the suit on the bond has not been discontinued; and this finding is conclusive against any right of action on the covenant.

The circumstances and contingencies upon which it was to become efficacious and have active operation, have not taken place.

The judgment must be affirmed, with costs.

The other Justices concurred.

Alanson H. Barden and another v. Joseph A. Briscoe and others.

Statute of frauds: Promise to pay debt of another. In an action to recover the price of board and supplies furnished to laborers and employes of a sub-contractor of the defendants, a verdict for defendants, with special findings that such sub-contractor was never agent of defendants, that the agreements were made with him personally, and not as agent, and

BARDEN v. BRISCOE.

that the debts sued for were incurred and the articles furnished solely on his credit and engagement, and not on account of defendants, shows that even if defendants had promised to pay the accounts, their promise was within the statute of frauds, as a promise to pay the debt of another.

Money had and received: Indebtedness to third person: Evidence. In order to make defendants liable for money had and received to the use of creditors of their sub-contractor, on the ground of their mere failure to pay to their sub-contractor, or on his account, a sum claimed to be his due, there must be a showing at least that there had been a settlement with him under which the sum so claimed had been allowed as so much money, and that defendants had agreed to pay it as their own obligation accordingly.

Evidence: Relevancy: Plaintiff's own theory: Rulings that do not prejudice. On the theory of the plaintiffs' right to recover as money had and received to their use a sum they claimed defendants owed their own sub-contractor, who was plaintiffs' debtor, evidence that defendants had in fact overpaid such sub-contractor would be relevant; and plaintiffs cannot complain on the ground of irrelevancy of the admission of evidence which is relevant upon the only issue under which it would have been possible for them to recover upon their own view of the case.

Arguments to the jury: Opening argument: Reply: Discretion. There is no absolute right on the part of counsel for defendants to cut off further argument to the jury by plaintiffs' counsel by declining to reply to the opening argument on plaintiffs' behalf, at least where other counsel for plaintiffs desire to be heard; but this matter comes within those discretionary rules, which must, unless in extreme cases, leave the trial judge to determine the course of the procedure. It is the duty of the judge, however, to so regulate this matter as to give a fair opportunity for counsel to thoroughly present the whole case to the jury.

Submitted on briefs April 5. Decided April 17.

Error to Superior Court of Detroit.

Jackson & Wiener, for plaintiffs in error.

E. Y. Swift and T. Romeyn, for defendants in error.

CAMPBELL, J:

Plaintiffs seek to recover against defendants for articles and board furnished to certain laborers and others under an employment or undertaking from one Aldrich, who had taken a sub-contract from defendants to finish a six mile section of the Detroit and Bay City Railroad, which defendants were building as general contractors.

The liability, so far as the allegations of error refer to it, is alleged to have arisen out of the fact that defendants

BARDEN v. BRISCOE.

paid the laborers during a portion of the time involved, and in paying them retained from each payment the amount of claims of such creditors as are represented by the plaintiffs, and continued to keep the moneys thus retained.

Under the testimony upon the trial, the court, under charges not complained of, and which were, so far as we can see, as favorable as the testimony warranted, left it to the jury to determine on whose credit the articles were furnished, and, upon the question of Aldrich's agency, held that defendants would be chargeable if by their conduct they had done any thing which was reasonably calculated to lead to a belief that Aldrich was their agent.

The jury found generally for the defendants, and found specially that Aldrich never was an agent, and further, that the agreements were made with him personally and not as agent, and the debts sued for were incurred and the articles furnished solely on his credit and engagement, and not on account of defendants.

Under these findings, there can be no question that even if defendants had promised to pay the accounts, their promise was within the statute of frauds, as a promise to pay the debt of another.

The plaintiffs, recognizing this difficulty, insist that the defendants are liable for money had and received to their use, by reason of the detention of the money.

As none of this money was paid to them for any purpose, and as it was merely a failure to pay so much money to Aldrich or on his account, it would be necessary at least to show that there had been a settlement with him under which these amounts now claimed had been allowed as so much money, and that they had agreed to pay them as their own obligations accordingly. Whether this would have brought them into a direct liability to plaintiffs or not, need not now be considered, as no such case was made out, and no charge was sought on that distinct basis. But as it is claimed a charge was asked implying this, it is sufficient to say there was no legal evidence on which to base it. All

BARDEN v. BRISCOE.

the evidence there was on the subject tended to show that Aldrich had been overpaid; and it is alleged as error that this evidence should not have been received. It was certainly receivable upon the theory of the plaintiffs; and was relevant upon the only issue under which it would have been possible for them to recover upon their own view of the case.

It is alleged further as error, that the court below improperly cut off the right of plaintiffs' counsel to sum up the case.

It appears from the bill of exceptions, that after the parties had rested the case, counsel for plaintiffs opened the case to the jury and occupied less than one hour in making said opening argument, and that he closed said opening argument as far as he desired then to do. The counsel for defendants stated they should only address the court on questions of law, and should not address the jury, who were allowed to be absent during the legal arguments. When these were closed, the counsel for plaintiffs desired to make a closing argument to the jury on the facts; but the court refused to permit him to do so.

It is certainly important to the administration of justice that no one be deprived of the full benefit of counsel. And it ought not to be allowed to counsel by any strategy or artifice to prevent a fair hearing. But it is necessary, in considering this matter, to regard the ordinary course of procedure. Usually the plaintiff's opening must indicate what the defendants are expected to meet. They have a right to know what arguments are to be urged against them, and this they can only learn from the opening, inasmuch as they have no reply. In most cases, if they do not think the opening requires any arguments to fortify their case against it, they may fairly let the case go to the jury as it stands, and no reply is needed where there is nothing to be replied to.

But while this is true in theory, it is also true that when all the testimony is in, the defendants know perfectly well

BARDEN v. BRISCOE.

before the opening what the line of argument against them must be, and that its effect upon the jury will depend more or less upon the skill and force of opposing counsel in presenting the facts. As only one counsel opens, and as where there are more than one the ground is usually divided, and the junior commonly precedes, the effect of cutting off a reply may be to prevent the whole case from being thoroughly presented. We cannot think that there is any absolute right in a defendant to produce such a result. Every court is bound in fairness to prevent such abuses. But inasmuch as the propriety of interference must depend upon circumstances, we think the matter comes within those discretionary rules which must, unless in extreme cases, leave the trial judge to determine the course of the procedure.

There is nothing in the present record to show that there was any thing to prevent the opening from being made as complete as possible. There is nothing to indicate that the decision of the jury under any argument could justly have been different. If we conceived it proper to review the action of a court on such questions, we should not regard this case as warranting criticism.

The judgment must be affirmed, with costs.

The other Justices concurred.

Frederick W. Heyn v. Charles F. Farrar and another.

Dissolution of attachment: Circuit court commissioner: Partner of plaintiff's attorney: Disqualification. On an application to dissolve an attachment, it is competent, where the only circuit court commissioner of the county is disqualified, under the statute (*Comp. L. 1871, § 5596-8*), to bring the matter, upon a proper showing, before the circuit court commissioner of an adjoining county. And a showing that the commissioner of the county is the law partner of the plaintiff's attorney, and that a portion of the papers in the cause were in his hand-writing, and that he had told defendant's attorney that he was interested as counsel and could not act as commissioner in the matter, is a sufficient showing of disqualification.

HEYN v. FARRAR.

Dissolution of attachment: Circuit judge: Commissioner of adjoining county.

The objection that the application in such case should have been made to the circuit judge, is held to be without force. The statute does not place applications to dissolve attachments on any different footing from other official action. And there is no special hardship in requiring a plaintiff who has sued out an attachment, which he cannot honestly do without means of proof of its propriety, to show that proof before an officer who must be presumed to be as competent in one county as in another.

Proceedings to dissolve attachment: Entitling: Special proceedings. The point that the proceedings before the commissioner should have been entitled in the original cause, is held not well taken. The proceeding is a special one, and the commissioner acts as an independent judicial officer, and not as a referee in the cause itself.

Submitted on briefs April 6. Decided April 17.

Certiorari to Circuit Court Commissioner of Ottawa County.

L. N. Keating, for plaintiff in *certiorari*, cited: *Comp. L. 1871*, §§ 5596, 6428; *Drake on Attachment*, § 411; *Bower v. Towne*, 12 Mich., 233; *Arnold v. Nye*, 11 Mich., 456; *Whipple v. Williams*, 1 Mich., 115.

No counsel appeared for defendants in *certiorari*.

CAMPBELL, J:

This is a *certiorari* to review the proceedings of a circuit court commissioner, dissolving an attachment sued out by plaintiff against defendants in the Muskegon circuit court. The action was had by Edwin Baxter, circuit court commissioner for the adjoining county of Ottawa, founded on a showing that J. E. Jamison, the only circuit court commissioner for Muskegon, was disqualified. The facts of disqualification were, that Jamison was engaged in practicing law with Mr. Keating, the plaintiff's attorney, and that a portion of the papers in the cause were in his handwriting, and that he had told the defendants' attorney that he was interested as counsel and could not act as commissioner in the matter.

On the hearing of the application by Mr. Baxter, Heyn appeared by counsel specially, and after a preliminary motion for security, moved to dismiss the proceeding for want

HEYN v. FARRAR.

of jurisdiction, on the ground that the application could only be made to the circuit judge or commissioner of Muskegon.

Heyn's affidavit averred that Jamison was never employed as his counsel. It did not deny his connection with Keating, nor his action in drawing the papers, nor his statements of disqualification; and Jamison and Keating made no affidavits. The affidavit for *certiorari* is also silent on this.

The statute authorizing the commissioner of an adjoining county to act in such cases was passed two years after the act for the dissolution of attachments, and declares "that in all cases where, by the laws of this state, any duties are required to be performed by a circuit court commissioner of the proper county, if such circuit court commissioner be attorney, solicitor or counsel in such suit or matter, or be a party thereto, or otherwise interested or unable to act or incapable of acting therein, such duties may be performed by a notary public of such county, being an attorney of the supreme court of this state; or, if there be no such notary public in such county, then such duties may be performed by a circuit court commissioner of an adjoining county."—*C. L.*, § 5596.

Section 5597 requires that such other officer, before acting, shall be satisfied, by affidavit or other competent proof, that such disability exists.

The statute (*C. L.*, § 5580) renders a commissioner incapable of acting where his law partner is interested. It was held in *Chandler v. Nash*, 5 *Mich. R.*, 409, that a notary public could not lawfully act under this statute, to dissolve an attachment. The evidence before Mr. Baxter was such as to authorize him to decide that Jamison was disqualified, and from the affidavits he would have found it difficult to decide otherwise.

The point that application should have been made to the circuit judge is without force. The statute placed applications to dissolve attachments on no different footing from other official action, and we cannot import any such excep-

HEYN V. FARRAR.

tion into the law. It is for the legislature to define public policy; but we cannot perceive any special hardship in compelling a plaintiff who has sued out an attachment, which he cannot honestly do without means of proof of its propriety, to show that proof before an officer who must be presumed to be as competent in one county as in another. The facility with which plaintiffs satisfy their consciences in making such affidavits needs no extraordinary encouragement from the courts.

The objection that the proceedings before the commissioner should have been entitled in the original cause, is not well taken. The proceeding is a special one, applicable to proceedings before justices and other courts besides those in circuit courts; and the commissioner acts as an independent judicial officer, and not as a referee in the cause itself.

The proceedings were correct, and should be affirmed, with costs.

The other Justices concurred.

The American Insurance Company v. Henry T. Cutler.

Promissory notes: Illegal consideration: Presumptions. In an action upon a note, given for a premium upon a policy of insurance, which is payable generally, and makes no mention of the place where made, it appearing that the plaintiff is a foreign corporation, it will not be presumed, in the absence of any thing showing where the policy for which the note was given was issued, that it was a Michigan policy, and was issued, and the note given for it, in violation of the laws of the state applicable to foreign insurance companies doing business here.

Submitted on briefs April 6. Decided April 17.

Error to St. Joseph Circuit.

Alfred Akey and J. M. Bailey, for plaintiff in error.

O. F. Bean and W. Sadler & Son, for defendant in error.

AMERICAN INSURANCE CO. v. OUTLER.

MARSTON, J:

This was an action of assumpsit brought upon a premium note under a policy of insurance dated January 28, 1873. The suit was commenced and tried in justice's court and a judgment rendered in favor of the defendant. The company removed the cause by *certiorari* to the circuit court, where the judgment of the justice was affirmed. The case comes here on writ of error.

Upon the trial the plaintiff introduced the note in question, whereupon the defendant admitted the existence of the plaintiff as a foreign corporation, created under the laws of Illinois, but did not admit its authority to do business in this state. Defendant then objected to the admission of the note in evidence because plaintiff had not averred in its declaration, or proved, and did not offer or propose to prove, that it had complied with the laws of this state applicable to foreign insurance companies, authorizing it to transact business in this state during the year 1873. No such proofs, having been introduced, offered, or proposed, the court sustained the objection and rendered judgment as already stated.

The note bears no mention of the place where made, and is payable generally. There is nothing in the record tending to show where the policy was issued, nor from which it can be inferred that the policy was a Michigan policy. The note appears to have been given for value, and we cannot presume that it was given in Michigan in violation of a law of this state. This case resembles very closely *American Insurance Co. v. Woodruff*, 34 Mich., 6, except that as the question there arose, the presumption was in favor of the correctness of the rulings. No such presumption exists in this case, as all the proceedings and evidence are set forth. The judgments of the justice and circuit courts must be reversed, with costs.

The other Justices concurred.

FIRST NATIONAL BANK OF STURGIS v. REED.

First National Bank of Sturgis v. Richard Reed.

Evidence: *Opinion of party as to his liability: Relevancy.* Where it is sought to hold one who while president of a bank had loaned moneys of the bank to an irresponsible person, liable for the same on the basis of his representations to the cashier at the time of the loans that he was interested with the borrower and would see the amounts repaid, it is error to permit the party to testify whether he ever regarded himself as liable; his opinion respecting his legal liability had no bearing on the case.

Banks: *President: Breach of trust: Loans to insolvent person: Agency: Adverse interest.* A bank president who, while in general charge of the business with the cashier under his authority, has permitted and directed the drawing of moneys from the bank without security by one known or supposed to be irresponsible, and with whom he was interested in the business for which the money was obtained, and has requested the cashier not to say any thing to the directors about it, is held personally liable to the bank for the moneys thus paid out by him in violation of his trust.

Fraud: *Agent: Credit: Books of account: Collusion: Notice.* The fact that the moneys thus drawn out were by the cashier, by direction and on the authority of the president, charged on the books of the bank to the irresponsible borrower, would not necessarily determine the transaction as a loan to him by the bank; but the bank, in the absence of any act of ratification or acquiescence on its part, would have a right, under the circumstances, to repudiate it as a transaction with the nominal borrower, and to insist on repayment by its president.

Agency: *Breach of trust: Accessory: Notice.* And such president, if he persuaded the cashier not to make known the facts to the directors, could claim nothing because of the cashier's knowledge; that officer's silence might, under such circumstances, make him accessory to the fraud, but could not tend to excuse the principal.

Silence: *Ratification: Question of fact.* The question of the effect to be given to the long silence of the bank directors after the charge to the nominal borrower was entered upon the bank books, is one of ratification, and should be submitted to the jury as such.

Submitted on briefs April 6. Decided April 17.

Error to St. Joseph Circuit.

Upson & Thompson, for plaintiff in error, as to the irrelevancy of the inquiry whether Reed regarded himself as liable, argued that the opinion of the party as to his liability was not evidence of any fact in the case relevant or material to the issue; and that it was not a question of science or skill, or of the kind admitting of the opinion of experts: *1 Greenl. Ev.*, § 440.

The authority of Reed to control and manage the business of the bank gave him no power to use the money in any other

FIRST NATIONAL BANK OF STURGIS v. REED.

than its legitimate business, much less to deliver it over to any one who might draw a check in his own favor on the bank, when he had no money on deposit there, and no bank account there, and also without taking any personal security for the moneys so paid out. Reed had no authority to take this money from the bank, under the circumstances disclosed by the evidence, and let Bennett have it, and he knew it. Neither he nor the cashier could lawfully do so, or engage the bank in a potato speculation, and it is questionable even if the directors had any such power as Reed assumed to exercise: *Laws U. S. 1863-4, Act of June 3, 1864, § 8; Bank v. Bennett, 33 Mich., 520; Ang. & Ames on Corp., §§ 298-9, 301.* The money taken by Reed and delivered to Bennett was known by Reed to belong to the bank, and he let Bennett have it to use in a potato speculation, illegally and without any security, and when he knew Bennett was insolvent, and he is liable to the bank for the money: *Ang. & Ames on Corp., § 314; Coll v. Steward, 50 N. Y., 17; Harway v. New York, 1 Hun, 628; Austin v. Daniels, 4 Denio, 299.* Reed also was an interested party with Bennett in the transaction, and this made his interest adverse to that of the bank, and he could not in the matter be acting as the agent of the bank, or bind the bank by his acts: *Story on Agency, § 210; Stone v. Hayes, 3 Denio, 575; Stevenson v. Bay City, 26 Mich., 44.* In such a business arrangement with Bennett, Reed, in taking the money and letting Bennett have it, was not acting as president of the bank, but in his individual capacity, and the bank was not chargeable with the knowledge he may have had on the subject; the directors were not in legal identity with him, either as to his acts or his information in respect to it: *Ang. & Ames on Corp., § 308; Seneca Co. Bank v. Neass, 5 Denio, 337; Weissner v. Dennison, 10 N. Y., 68; Manufacturers' Nat. Bank v. Barnes, 65 Ill., 69; 34 Mich., 30.* The charging the money on the books to Bennett was the act of Reed himself and not of the bank, and he could not change the nature of the transaction by any such device; and the directors were not notified of it, but knowledge of it was kept from them by Reed's efforts, and the matter never appeared among the discounts of the bank.

J. B. Shipman and H. H. Riley, for defendant in error, as to the admissibility of the inquiry as to whether Reed regarded himself as liable, cited: *19 Mich., 57; 14 N. Y., 471; 6 Am., 460;* that at all events its admission could not have prejudiced, as the jury had all the evidence of the defense, to fix plaintiff's

FIRST NATIONAL BANK OF STURGIS v. REED.

liability on the set-off, if he was liable: 27 Mich., 451; 28 Mich., 432; and the jury were charged that if they found certain facts the plaintiff *would* be liable, notwithstanding his opinion on the subject.

The president and cashier being authorized generally to do the business of the bank, *their* knowledge was the knowledge of their principal, the bank. If a person acts notoriously as the president or cashier of a bank, and is recognized by the directors or the corporation as an existing officer, a regular appointment will be presumed, and their acts will bind the corporation: *Story on Agency*, § 52; *Ang. & Ames on Corp.*, 270; 1 Doug., 196, 457; 4 Mich., 606; 14 Mich., 208; 12 Barb., 67; 12 Cush., 1; 4 Cow., 645; 8 Conn., 472.

The silence of the directors for three or four years after Bennett's account had been openly charged to him on the journal at the bank, with the credits, was ratification: 36 Conn., 325; 4 Am., 80; 9 Bush, 609; 15 Am., 731; *Morse on Banking*, 107; 4 Mich., 606.

If the president and cashier, or either, were to be "presumed, in the absence of proof to the contrary, to act within the scope of their power" (making discounts being among them), then the delegated power, proved to have been given to them, to make discounts, renders every contract made by them for the bank in good faith *final*, whether the bank or its board of directors had *actual* knowledge of the same, or did or did not *affirmatively* assent thereto as a *board* by action, or whether they had thereupon made a discount to a solvent or insolvent man, in the language of plaintiff's requests. The acts of the officers are the acts of the bank *as soon as performed*, and the charge as given was favorable to plaintiff in error.

It being admitted that the money paid on Bennett's checks were charged to him upon the books of the bank, and so remained for three or four years, it is to be presumed, in the absence of other evidence, that this fact came to the knowledge of the directors in due course of business, and this presumption can only be overcome by proof: *Morse on Banking*, 107; 36 Conn., 325; 4 Am., 80; 15 Am., 731.

The question as to whom the *original* credit was given was the central fact in the case, and upon it turned the question of set-off; and this was fairly submitted to the jury and found against the defendant.

COOLEY, CH. J:

In a suit brought by Reed against the bank to recover

36 MICH.—34.

FIRST NATIONAL BANK OF STURGIS V. REED.

for dividends due him on stocks, the bank sought to set off certain sums which he, when acting as president of the bank some years ago, had paid out or directed to be paid out to one Bennett under circumstances which it is claimed should render him personally liable. It was shown very clearly that while Reed acted as president he took general charge of the business, and that the cashier obeyed his directions. The first item in dispute was two hundred dollars drawn by Bennett, Dec. 16th, 1869. The cashier's testimony was, that this was paid to Bennett by Reed out of banking hours when the witness was not present, and that when he came in and inquired about it, he told Reed the directors would not like to open an account with Bennett, as he was insolvent, but Reed told him to charge it to Bennett, and he, Reed, would see it paid; that Bennett was to use the money in buying potatoes, and would send the money received therefor to the bank. The next item was one of five hundred dollars which Reed allowed Bennett to draw in the cashier's absence, December 27th, 1869. In respect to this the cashier testified that when it was brought to his attention he objected to it, but Reed directed him to charge it to Bennett, and said that he, Reed, would see it paid, and added that he was interested with Bennett in the profits of the potatoes. The cashier also gave evidence that Reed at various times requested him to say nothing about these transactions to the directors, and he would settle the matter. This statement of evidence is perhaps sufficient to admit of a proper understanding of the legal questions. The set off which was claimed, embraced the two items mentioned, and a further sum of five hundred dollars which Bennett was allowed to draw a little later.

Reed was sworn on his own behalf, and his attention being called to the sums drawn out by Bennett, he denied having told the cashier he was interested with Bennett, and also denied having agreed to see the amounts repaid. He was then asked this question: "Did you ever regard yourself as liable?" and was allowed against objection, to reply:

FIRST NATIONAL BANK OF STURGIS V. REED.

"I never did." This question and answer were manifestly objectionable. They put before the jury no fact beyond the state of mind of the witness at the time, and that had no necessary bearing on the case. He might have promised to see the moneys repaid, and yet have believed he was not liable to do so; or he might have so believed because he had never promised. The answer, therefore, gives us no information of any value whatever, and the purpose could only have been to influence the jury with the witness' opinion respecting his legal liability; an opinion with which they had no concern.

The judge, in submitting the cause to the jury, was requested to instruct them that "if the jury find from the evidence that the plaintiff at the time he was president of the defendant, took and delivered or caused to be taken and delivered to Bennett, without the knowledge of the defendant, in the months of December, 1869, and January, 1870, the three several sums of money testified about in this cause, he, the plaintiff, knowing or having good reason to know that the said Bennett was insolvent, then the defendant should be allowed the amount of the moneys as a set off." This request was refused, and in stead thereof the judge instructed the jury that "if the money paid on Bennett's check and telegram was on Bennett's account, if the credit was given to him originally, and not to Reed, then and in that case it cannot be made a charge against Reed by reason or because of any interest which Reed may or may not have had in the potato business with Bennett."

The instruction refused and that which was given must be considered in the light of the evidence which showed that the original transaction with Bennett was one in which no one participated but Reed himself; that it was in effect a loan to a person supposed at the time to be irresponsible, without taking any security, and that it was charged to Bennett only on Reed's authority. We do not think such a charge would necessarily determine the transaction as a loan from the bank to Bennett; on the contrary, we think

FIRST NATIONAL BANK OF STURGIS v. REED.

that the bank, independent of any subsequent act of ratification or acquiescence, would have had a right to repudiate it as a transaction with Bennett, and to insist on repayment by Reed; especially if it should appear that Reed was interested with Bennett in the business for which the money was obtained.

Taking the statement of the cashier as true, the act of Reed in allowing Bennett to draw moneys from the bank was wholly irregular and unwarranted. It was without the knowledge of the proper financial officer of the bank,—the cashier,—and without taking security. These facts, in connection with the supposed insolvency of Bennett, made it a gross breach of trust. It is not to be suggested that the directors had in law notice of the transaction, for it is shown that no one knew of it but the president himself. We therefore regard the case as within the decision in *Austin v. Daniels*, 4 Denio, 299, in which it was held that bank officers who abuse their powers must personally account to the bank for what it shall suffer thereby. See also, *Commercial Bank v. Ten Eyck*, 48 N. Y., 305. This is fundamental law, and only applies to officers of corporations the same rules which are applicable to the agents of individuals. A loan by the president under the circumstances indicated would be a fraud on the bank; and the president, if he persuaded the cashier not to make known the facts to the directors, could claim nothing because of the cashier's knowledge; that officer's silence might make him accessory to the fraud, but could not tend to excuse the principal.

We cannot undertake on this record to determine what effect should be given to the long silence of the bank directors after the Bennett account was entered on the books. As before stated, the question is one of ratification, and should be submitted to the jury as such.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

JOHNSON v. KIBBEE.

George K. Johnson v. Henry C. Kibbee.

Plea puis darrein continuance: New issue. A plea *puis darrein continuance* operated at common law to destroy the issue previously formed, and required a new issue to be formed, by replication or otherwise.

Special pleas: Statute construed: Plea puis darrein continuance. The statute (Comp. L. 1871, § 5792) abolishing special pleas was not designed to deprive the defendant of the right to make a special defense of matters arising subsequent to the filing of his plea of the general issue; and section 5794, requiring notice of special matter of defense to be annexed to the plea of the general issue, does not operate to require notice to be so given of matters which if pleaded specially would be inconsistent with and destroy the general issue, and does not apply to the case of pleas *puis darrein continuance*.

Submitted on briefs April 6. Decided April 17.

Error to Wayne Circuit.

This was assumpsit upon a promissory note; plea the general issue, with notice of special matters of defense. Proceedings were stayed for a considerable time, and when that stay was removed and the cause set down for trial, the defendant filed a plea of payment, in the form of a plea *puis darrein continuance*, to which no demurrer or replication was filed. The cause coming on for trial, it was tried upon the original issue, and judgment rendered for the plaintiff, and the defendant brought error.

Henry M. Cheever, for plaintiff in error.

D. C. Holbrook, for defendant in error.

MARSTON, J:

It is conceded by counsel in this case that at common law the effect of a plea *puis darrein continuance* is to destroy the issue previously formed; and that a new issue must be formed on the plea *puis darrein*, by replication or otherwise, and such undoubtedly was the rule. It is claimed, however, by defendant in error, that our statute

JOHNSON v. KIBBE.

(*Comp. L.*, § 5792) abolishing special pleas would seem to prevent the making a special defense by plea, arising in a case subsequent to the filing of the plea of the general issue, and that no provision is made to meet the exigency of such a case; that the defense could hardly be recognized by a notice containing the matter of the plea, and that there is no provision for a notice in such a case, as this defense must, being new matter, by the common law, be set up by special plea of a peculiar form, and sworn to.

This, we think, is a strong reason why no forced construction should be put upon the statute referred to, in order to deprive a defendant of the right to bring in and set up in his defense new matter. *Section 5794*, which requires notice of special matter of defense to be by the defendant annexed to his plea of the general issue, we think, cannot be so construed as to require notice to be given of matters which if pleaded specially would be inconsistent with and destroy the plea of the general issue. Besides, this section contemplates that the notice to be given shall be annexed to and put in with the plea of the general issue at the time it is filed. There is no doubt but that notice of special matter of defense annexed to the plea is much the simpler and easier method of pleading, and should be adopted when applicable, and that courts should be liberal in permitting such notice to be given or amended in furtherance of justice. It is evident, however, that such notice cannot be adopted in all cases, and we think this one of them. The other questions we need not consider.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

HOUGHTON COUNTY v. AUDITOR GENERAL.

The People on the relation of Houghton County v.
The Auditor General.

Mandamus: Strict legal duty: Discretionary matters. *Mandamus* lies only to enforce strict legal rights, and will not be granted to enforce the doing of an act which by law lies in the discretion of the officer refusing to do it.

Delinquent tax returns: Auditor general: Returns forwarded too late: Statutes construed. The statute (*Comp. L. 1871, § 1034*) requiring all returns by the county treasurers of lands on which the taxes are delinquent, to be delivered into the auditor general's office on or before the last day of March in the year following their assessment, and the auditor general being required by another section of the statute (*§ 1044*) to make out the lists for publication on the first day of July, *mandamus* will not be granted to compel that officer to receive and accept such returns which are forwarded after the first day of July and upon the basis thereof to credit the county with the amount of delinquent taxes so returned.

Discretion: Accounts between state and county: Belated returns. Whether or not the auditor general might in his discretion receive and accept returns forwarded to him at such a late day, it is clear there is nothing in the statutes making it his duty so to do, or conferring upon the county the legal right to demand credit upon its account with the state for the amount of such belated returns.

Heard April 10. Decided April 17.

Application for *mandamus*.

1. L. Chadbourne, S. F. Seager and Ashley Pond, for relator.

Otto Kirchner, Attorney General, for respondent.

COOLEY, CH. J:

Application is made in this case for a *mandamus* to compel the auditor general to credit the relator with the taxes assessed on lands returned as delinquent thereon for the taxes of the year 1870. The controversy grows out of the failure of the county treasurer to make return in due season; the return not having been forwarded by the county treasurer until after the first day of July, 1871, and not having been received at the auditor's office until the 25th of that month.

HOUGHTON COUNTY v. AUDITOR GENERAL.

The statute plainly contemplates that all returns shall be delivered into the auditor's office not later than the last day of March in the year following their assessment.—*Comp. L.*, § 1034. This is not disputed by the relator, but it is contended that the requirement of time is directory merely, and that the auditor general has no discretion to refuse to receive the return whenever it may come in, and to credit the county with the amount of taxes reported delinquent. This construction of the statute is based on the idea that neither the state nor individual tax-payers can be injuriously affected by the delay.

So far as the interests of individual tax-payers are concerned, it is probably true that they do not necessarily suffer from the delay except as inconvenience may be an injury. They have always a right to pay their taxes to the county treasurer, and if they apply there for the purpose, they need not concern themselves with the return to the auditor's office. But under our present system it is contemplated that there shall always be an opportunity to pay delinquent taxes at the auditor's office; and where parties own lands in different counties, the convenience in doing this is often of considerable importance. And as the delinquent taxes are increased rapidly by heavy interest for delay in payment, it is reasonable to suppose that parties might have their burdens considerably increased while waiting for a return which they know ought to be made, but which they cannot tell when to expect. It would also be very likely to lead to mistakes and to losses of land in consequence, if parties who pay at the auditor's office, and who apply at a time when all unpaid taxes should be found there, and pay all that the records there show, were liable afterwards to have delinquencies reported against them.

But we think if the statute is construed in the light of state interest merely, there are reasons for justifying the action the auditor has taken. Under other provisions the auditor is to proceed to make out the lists of delinquent lands on the first day of July, and to advertise them for

HOUGHTON COUNTY v. AUDITOR GENERAL.

sale.—*Comp. L. § 1044.* These lands, it will be seen, were not returned in time for that purpose. Now we are not disposed to question the right of the auditor general to receive a delayed return that comes to him in such time that he may make use of it without its creating any confusion in his office; and we are inclined to think any inconvenience individuals may be put to in consequence must be overlooked as something incidental to the accidents of public administration. But the grounds on which the auditor may be compelled to receive a return after the time when he may make use of it for the purposes of a sale for the current year, are not to our minds at all satisfactory. The statute has then not been complied with; some inconvenience and a year's delay in the most important step to be then taken,—the sale,—has then been caused, and some embarrassment in the accounts between the county and the state must follow. To compel the auditor at that time to receive the return, the county should be able to point to some statute which makes it his legal duty. We find no such statute; on the other hand, as before stated, we think the statute very plainly contemplates no return later than the last day of March. If the auditor, in his discretion, might consent to receive it, his discretion must be appealed to; mandamus lies only to enforce strict legal rights.—*People v. Judges, etc., 1 Doug. (Mich.), 319; People v. Judge of Wayne Circuit, 19 Mich., 296; East Saginaw Water Com'rs v. Common Council, 33 Mich., 164.*

Whether the state would actually be the loser by crediting the delinquent taxes to the county after the proper time for a return, we do not care to consider. The statutes are not very clear regarding the accounts between the counties and the state in some particulars, and a consideration of that question might require an examination into the settled practice of the auditor's office. But it is enough for us to decide that in our opinion the county had no legal right to demand the credit. If it had such a right at the time,

HOUGHTON COUNTY v. AUDITOR GENERAL.

it might be necessary to inquire into the effect of the long delay in making this application.

The writ must be denied.

The other Justices concurred.

The People on the relation of Dennis P. McCarthy
and others v. The Judge of Monroe Circuit.

Mandamus: Review of motion: Record. Upon an application for *mandamus* to require a circuit judge to grant a motion made upon a showing of facts before him and which upon the showing he denied, the case must be heard on the facts disclosed on the hearing of the motion in the circuit, and not on new facts first brought into the case on this application.

Mandamus: Record: Facts on which action was taken: Legal rights. Where on an application for *mandamus* complaint is made of the action of the circuit judge in refusing to grant relators' motion for a resale upon execution, the proceeding being a proper one to be considered upon evidence and to be determined according to the requirements of the facts established, unless the case made on the motion before the circuit judge was such as to give relators a plain legal right to the order of resale, *mandamus* will not be awarded.

Mandamus: Record: Facts established below. And where the record on the application for *mandamus* does not disclose what the showing was on the motion in the circuit, the court cannot say relators were entitled to any different order on their motion than that which was made, and will not grant *mandamus* to compel the circuit judge to reverse his action.

Heard April 10. Decided April 17.

Application for *mandamus*.

Brennan & Donnelly, for relators.

Ashley Pond, for respondent.

GRAVES, J:

December 14, 1875, relators recovered judgment in the circuit court for the county of Monroe against one Hood for

MCCARTHY V. JUDGE OF MONROE CIRCUIT.

three hundred and sixty-three dollars damages, and twenty-one dollars and ten cents costs.

December 20th an execution was issued on the judgment to the sheriff of Monroe county, and on the 27th of the same month levied on Hood's interest in certain real estate, and a certificate of the levy was duly made and filed the same day in the office of the register of deeds of the county. The property was thereupon regularly advertised to be sold under the levy on the 29th of April, 1876, but the sale was adjourned to the 3d day of May, A. D. 1876. The property, represented as worth fifteen hundred dollars over and above incumbrances, was sold to one Gilmore for forty dollars.

May 9, 1876, relators moved in the circuit court to set aside said sale on the ground of inadequacy of price, mistake and fraud, and on the 20th of June thereafter the court granted said motion. No order for reselling was made.

July 24, 1876, relators moved for a special order of sale upon the levy, and the court, after hearing, denied the motion.

Relators now ask that a *mandamus* may be awarded to require the circuit judge to vacate the order denying the motion for a resale, and further requiring him to make an order for the sale of said real estate under the levy.

The return made to the order to show cause against the award of *mandamus* states that on the hearing of the motion to set aside the sale it appeared and was conceded that subsequent to the sale, namely, on the 6th of May, 1876, the premises in question had been sold under an execution upon a judgment in favor of Edson, Moore & Co., and had been purchased on their behalf; and the return further states that at such hearing no evidence, by affidavit or otherwise, was produced or offered to show to respondent's satisfaction that when Edson, Moore & Co. purchased they knew or had any reason to suspect that there had been any mistake, misapprehension or irregularity in or about the sale under relators' execution, or in the purchaser of the premises, or that Edson, Moore & Co. had not so purchased in good

MCCARTHY v. JUDGE OF MONROE CIRCUIT.

faith, relying upon their right to redeem from the prior sale made under relators' execution; that respondent informed the relators' counsel that if they so wished he would set aside the sale on relators' execution, but upon the evidence before him he could not set aside the sale on the later execution, or grant an order for a resale on relators' levy, and that relators' counsel thereupon expressed their willingness to have said sale on relators' execution set aside, and that the same was done accordingly.

That on the later motion for an order for resale no further evidence was introduced or offered than had been made at the hearing to set aside the sale, and that the motion was refused for the same reason which had caused the denial of resale at the first hearing.

Now, the object of the present application is not to require the circuit judge to consider and decide upon ordering a new sale.

The relators had a hearing upon the question and the judge decided against them, and it is now urged that he was wrong in his decision and that upon the facts the relators were entitled as matter of law to the order they sought, and that the judge should be required to reverse his decision and make the order which the relators moved for before him.

The application for *mandamus* cannot rest upon original explanations made here in regard to the circumstances going to favor the granting of an order of resale or otherwise, but it must depend upon the case which was made before the circuit judge.

The proceeding was a proper one to be considered upon evidence and to be settled and disposed of according to the requirements of the facts established.

Unless there was a plain legal right on behalf of relators to the order, it was not the duty of the judge to grant it, and it would not be proper to award *mandamus* to require him to change his ruling and allow the order. And how this was, depended upon the showing which was made before him. If the case was not sufficient, then there was no

MCCARTHY v. JUDGE OF MONROE CIRCUIT.

legal right in relators to the resale, and no presumption can be indulged that the facts presented to the judge required him to reach a decision contrary to the one made.

Without seeing the case made before him, therefore, it is not apparent that a legal right was shown to the relief demanded.

Now, the record fails to give us information on this subject, and leaves us in the dark in regard to the state of facts which existed before the circuit judge, and hence we cannot say the relators were entitled to any different order from that which was made.

In this state of things it is not expedient to discuss several interesting points made in argument, concerning the effect of the two levies and the proceedings under them, and the abstract power and duty of the court.

The writ must be denied, with costs.

The other Justices concurred.

Daniel F. Comstock v. James W. Norton.

Evidence: Orders: Payment by plaintiff at defendant's request: Corroboration: Relevancy. In an action to recover the amount of certain orders drawn on defendant by a firm who were managing for him a lumber camp, for the payment of men employed in the camp, and which the plaintiff claims to have cashed at defendant's request and on his promise to repay the sums so advanced, the defense being that defendant had made no such arrangement with plaintiff and had no concern with the payment of the men, and that his relations to them were inconsistent with his assuming to become liable as claimed, the written contract between defendant and said firm, which contemplated defendant would or might look after the wages of the men, is held to be relevant and material evidence for the plaintiff.

Charge to the jury: Hypotheses of the parties: Evidence. A party is entitled to a charge applicable to the theory of the case for which he contends and which his evidence tends to support.

Statute of frauds: Promise to pay debt of another. An arrangement by which plaintiff was to cash for defendant orders drawn on defendant by his

COMSTOCK v. NORTON.

contractor in payment of employes of the latter, and defendant was to reimburse plaintiff for the moneys so advanced by him, is not within the statute of frauds as a promise to pay the debt of another; such an arrangement is original and direct, and not secondary or collateral.

Charge to the jury: Hypothesis unsupported by evidence. Instructions to the jury which submit to their consideration an hypothesis different from that maintained by either side and which is not supported by the evidence, are misleading and erroneous.

Submitted on briefs April 10. Decided April 17.

Error to Kent Circuit.

Taggart, Simonds & Fletcher, for plaintiff in error, upon the question of the admissibility in evidence of the contract between defendant and Johnson & Co., cited: *People v. Jenness*, 5 Mich., 307; *People v. Doyle*, 21 Mich., 221; *Clark v. McGraw*, 14 Mich., 139; *Stephen's Dig. of Ev.*, 14; 1 *Greenl. Ev.*, § 51; and to the point that the statute of frauds was not applicable to the case made by the plaintiff's evidence: *Browne*, § 188, and cases cited in note 3; *Mersereau v. Lewis*, 25 Wend., 243; *Weld v. Nichols*, 17 Pick., 538; *Aldrich v. Ames*, 9 Gray, 76; *Alger v. Scoville*, 1 Gray, 391; *Pratt v. Humphrey*, 22 Conn., 317.

G. Chase Godwin, for defendant in error, cited: *Leonard v. Fredenburgh*, 8 Johns., 39; *Nelson v. Boynton*, 3 Metc., 402; *Fullam v. Adams*, 37 Vt., 391.

GRAVES, J:

During the lumber season of 1875 Comstock was carrying on banking at Clam Lake, and Norton was engaged in lumbering near there.

Norton had two lumber camps, one of which was managed by a foreman named Boseley, and the other was controlled and conducted under a written contract with Norton, by Orrin L. Johnson and W. P. Miller, who assumed the firm style of O. L. Johnson & Co. March 29, 1875, Boseley issued to one Burns a ticket indicating that Burns was entitled to thirty-three dollars and ninety cents from Norton, for labor done. It was directed to Norton. Burns, however, endorsed it to Comstock, who cashed it.

From February 16th to April 3d, Johnson & Co. drew

COMSTOCK v. NORTON.

a number of orders on Norton in favor of different persons and they were severally cashed by Comstock. That these orders were all drawn in connection with the lumber business in question, does not appear to have been disputed.

Comstock claimed that Norton requested him to cash all such orders, and promised to repay him whatever he should so advance for him. Norton, on the other hand, denied making any such arrangement, and insisted that he was under no obligation to take care of orders issued by Johnson & Co. Norton refusing to redeem the orders, or refund to Comstock what he had paid, the latter sued to recover the amount.

Johnson, being called to the stand on the part of Comstock, testified that Norton instructed him that if he would draw orders in favor of the men, he, Norton, would have them cashed by Comstock, and that these orders were drawn accordingly and charged up to Johnson & Co. by Norton.

Further evidence was given which tended to show that Norton requested Comstock to cash the orders and promised to reimburse him whatever he should advance.

The counsel for Comstock then offered in evidence the written agreement between Norton and Johnson & Co., but the court excluded it, on Norton's objection that it was irrelevant and immaterial. This ruling was erroneous. It was part of the theory of Norton's defense that he had no concern whatever with the payment of the men under Johnson & Co., and that his position was not consistent with the idea of his assuming to become liable for advances to meet their orders. The contract, however, seems to have contemplated that Norton would or might look after the wages due the men, and hence favored the plaintiff's construction. Moreover, it was closely connected with the transaction between Comstock and Norton, and was needed to help to a perfect understanding of the other evidence. The jury were entitled to have it laid before them as one of the surrounding facts essential to a satisfactory determination.

COMSTOCK v. NORTON.

When the judge came to submit the case to the jury, he instructed them that if the orders were not originally the debts of Norton, then no promise of his to pay them could be binding upon him unless in writing signed by him or by some one authorized, and he refused to charge that in case they should find Norton requested Comstock to pay the orders and that he did pay them, then that Comstock would be entitled to recover the amount so paid, with interest at seven per cent.

There was error in these rulings. The plaintiff was entitled to a charge applicable to the theory he contended for and which his evidence tended to support, and the instruction which was refused should therefore have been given. He claimed, and his evidence favored the position, that he simply cashed the orders in question pursuant to Norton's request and on his promise to reimburse him; and if such was the construction of the transaction, the statute of frauds had no concern with it. The arrangement was original and direct, and not secondary or collateral. It was merely an arrangement whereby Comstock undertook to act as Norton's banker, and, at his request and to his use, pay such orders as might be drawn on him. The charge given in this connection was not applicable to the facts on either side. Not on the part of Comstock as already explained, and not on the part of Norton, because his position on the facts was, that he never requested Comstock to pay any orders, and never promised to reimburse him, and consequently that no verbal promise had been made to be ruled by the statute of frauds.

The plaintiff was allowed to recover only for the amount of the little order drawn by Boseley.

The judgment should be set aside, with costs, and a new trial ordered.

The other Justices concurred.

LAWRENCE V. JARVIS.

Lyman Lawrence v. Doctor Morris Jarvis.

Foreclosure sale: Order setting aside sale: Appeal: Interested party. A complainant who has purchased at foreclosure sale and afterwards conveyed to a third party, would be injuriously affected by an order setting aside the sale under which he acquired the title which he afterwards parted with, and has an interest in the matter sufficient to support an appeal.

Setting aside foreclosure sale: Third party interested: Notice. On a motion to set aside a foreclosure sale, when it appears that third parties have acquired rights in the premises under the sale sought to be set aside, no further proceedings should be taken until they have notice and an opportunity to be heard.

Submitted on briefs April 12. Decided April 17.

Appeal in Chancery from Kent Circuit.

Taggart & Allen and E. S. Eggleston, for complainant.

W. L. Stoughton and J. P. Atwood, for defendant.

MARSTON, J:

A bill of complaint was filed in the circuit court for the county of Kent, in chancery, to foreclose a mortgage given by defendant to complainant. A decree was obtained and the premises were sold by the circuit court commissioner thereunder on the 5th day of April, 1875, to complainant, who was the highest bidder. The purchaser, upon the 22d day of May following, conveyed the premises to Horace Tompkins, who entered into possession of the premises and made improvements thereon.

Defendant Jarvis, upon the 26th day of September, 1876, filed his petition in said court to have the sale of April 5, 1875, set aside and held for naught, and a sale *de novo* ordered, for the reason that the sale was on a day of general election; that the lands were bid off before the hour mentioned in the notice of sale, and inadequacy of price. Affidavits were filed in support of, and also against, the

LAWRENCE v. JARVIS.

facts set forth in the petition. A hearing was had, and on the 7th day of December, 1876, the sale was set aside and held for naught, and a new sale ordered in case defendant made default in payment of the amount of the original decree, with costs. Afterwards a motion was made to vacate and set aside this order, which was denied. Complainant then appealed from both orders.

It appeared upon the first hearing that the subsequent purchaser, Tompkins, had no notice of the proceedings then being taken, and this was one of the reasons assigned in the motion to vacate the order of December 7th.

No question is raised as to the right of complainant to appeal because of a want of interest, he having sold to a third party. We think it must be assumed that a complainant who has purchased at a foreclosure sale and afterwards conveyed to a third party, would necessarily be injuriously affected by an order setting aside the sale under which he acquired the title which he afterwards parted with.—*Berry v. Innes*, 35 Mich., 189. Upon the question of notice to Tompkins, when it appeared that third parties had acquired rights in the premises under the sale sought to be set aside, no further proceedings should have been taken until they had notice and an opportunity to be heard.—*Crawford v. Tuller*, 35 Mich., 57. The order setting aside the sale and ordering a new one must be reversed, with costs.

The other Justices concurred.

ALLISON v. CONNOR.

William Allison v. William Connor and another.

Fraud: Indivisible cause of action: Settlement. A fraud cannot be separated into two causes of action, and one settled for and the other left open: it is and must be an entirety. And a demand for the fraudulently selling by defendants to the plaintiff of property not their own, which has been paid for partly in plaintiff's own money and partly with obligations of another, the transaction being a single one, cannot be split up and the fraud settled for so far as it applied to the cash purchase, and the controversy left open as to the residue.

Settlement: Fraud: Charge to the jury. And where a settlement is admitted, the controversy being whether it was a full accord and satisfaction or confined to the portion of the property for which plaintiff paid in his own money, and there being no evidence that it was expressly agreed to leave some portion of the controversy outside the settlement, a charge that if there was a full accord and satisfaction of plaintiff's individual claim, or if he released any claim or demand he had in his individual name, there could be no recovery, is held not error.

Heard April 4. Decided April 18.

Error to St. Joseph Circuit.

Alfred Akey, for plaintiff in error.

W. Sadler & Son and *H. H. Riley*, for defendants in error.

COOLEY, CH. J:

The plaintiff, who had purchased of defendants a quantity of railroad ties, paying therefor partly in money belonging to himself and partly in obligations belonging to the Michigan Air Line Railroad Company, has brought this action to recover from defendants for fraudulently selling to him ties they did not own. It appeared in evidence, and was admitted by the plaintiff, that there had been between him and the defendants some sort of a settlement, but there was a dispute as to how much it covered; the plaintiff claiming that it was a settlement only for so much as he purchased with his own money, and defendants claiming that there was a full accord and satisfaction.

ALLISON V. CONNOR.

The jury returned a verdict for defendants, and the plaintiff complains that the charge of the judge was calculated to mislead them as regards the settlement. Among other things they were instructed that if what the defendants delivered to the plaintiff was "then received and accepted by the plaintiff in full satisfaction of his individual claim against the defendants, the plaintiff cannot recover." And again: "If these parties have made an agreement and mutually adjusted the matters of difference between them at that time, by which the plaintiff has released any claim or demand which he then had in his individual name against these defendants, then he is by such release or such agreement forever barred from further pursuing the action which he might then have against them."

We cannot find any fault in these instructions. The plaintiff had but one claim against the defendants, and if he settled with them at all, it must have been for the whole claim. A fraud cannot be separated into two causes of action, and one settled for and the other left open; it is and must be an entirety. The evidence did not show distinct transactions between these parties in one of which the purchase was made with the plaintiff's own money and in the other with obligations of the railroad company, but it showed a purchase in which payment was made without any such discrimination. It was therefore obviously impossible for the plaintiff to settle for the fraud so far as it applied to a purchase with his own money, and leave the controversy as to any thing further still open. His demand was single and incapable of division.

Perhaps, had there been evidence that the parties expressly agreed to leave some portion of the controversy outside of the arrangement alleged to have been made by them, a question might have arisen which would have been embarrassing; but there was no such express evidence. It was denied by the plaintiff that any attempt was made to settle beyond what he had paid with his individual property; but

ALLISON v. CONNOR.

he does not claim that in such settlement as he did make any rights were expressly reserved by him. And as he could have had no claim against these defendants except an "individual" claim, we think the charge given was strictly correct.

The judgment must be affirmed, with costs.

The other Justices concurred.

William P. Innes v. David Stewart and another.

Foreclosures: Deficiency: Proceedings at law: Leave of court. Under the statute (*Comp. L. 1871, § 5149*) leave of the court where the foreclosure was had, is essential to justify proceedings at law to recover a deficiency on a mortgage foreclosure in chancery.

Personal decrees: Service: Appearance: Publication. A personal decree cannot lawfully be rendered against a defendant brought in by publication, but who has not been served with process or appeared in the cause.

Foreclosure sales: Deficiency: Interference to prevent fair sale: Estoppel. The interference by parties interested in a chancery foreclosure sale to prevent a fair and usual sale to the highest bidder, as by making arrangements with persons who intended to bid at the sale to protect their interests, whereby they were deterred from bidding, is enough of itself to estop them from claiming a deficiency on the sale, which they have been the means of creating; and their action at law for an alleged deficiency so created will be enjoined in equity.

Heard April 5. Decided April 18.

Appeal in Chancery from Kent Circuit.

J. A. Rogers, T. B. Church and Norris & Uhl, for complainant.

Taggart, Simonds & Fletcher, for defendants.

CAMPBELL, J:

Innes filed his bill to restrain a suit on a bond for an

INNES v. STEWART.

alleged deficiency after a mortgage foreclosure, the sale having been made in April and confirmed in June, 1864, and the suit complained of having been begun in 1874. The bill claims the debt was paid by the sale, and also that whether technically paid or not, the circumstances were such as to operate the same result, by the interference of interested parties in preventing bidders from appearing.

No leave was granted by the circuit court of Kent county, where the foreclosure was had, to sue on the bond, which was necessary to justify such action.—*C. L.*, § 5149; *Joslin v. Millspaugh*, 27 *Mich. R.*, 517.

Innes made two purchase money mortgages for four thousand dollars each in May, 1854, to John Ball and Ransom E. Wood, payable in ten years. One of these came into the hands of Newton Carter, who began a foreclosure in March, 1863, and got a decree in February, 1864, under which sale was made to John Ball as aforesaid for about sixteen hundred dollars. The other was foreclosed at the same time in the name of one Alexander, and bid in by Ball for a smaller sum. Immediately after Ball received his deed, and on the next day, June 4, 1864, Ball conveyed to David Stewart the whole property purchased on both foreclosures, for the amounts due on the decrees for principal, interest and costs, amounting to about ten thousand dollars, at the same time transferring the whole securities, or intending such transfer.

Innes was not served with process, but brought in by publication. As he never appeared, there could be no personal judgment against him, and no attempt was made to obtain any order of execution for the deficiency. The decrees were shaped, in regard to the order of sale of the various parcels, by stipulations of certain of the parties defendant who had purchased lots, and the sale was made in that agreed order.

It is now claimed that the sale was in fact conducted under an arrangement whereby David Stewart was to get the title, and that persons who would otherwise have bid

INNES v. STEWART.

were induced not to do so by private arrangements for their protection which were subsequently carried out.

After purchasing the land, Innes sold out to William H. Stewart, and one Ives, who in December, 1857, conveyed his share to his co-tenant, who thus took the whole title. The land, which was near Grand Rapids, consisted of about 400 acres, divided and intended to be divided into lots.

Innes gave Stewart and Ives a bond of indemnity against the Wood and Ball mortgages. They paid him three thousand dollars and gave him a mortgage for sixteen thousand five hundred dollars for the balance of the purchase money. This mortgage, dated in October, 1856, was assigned by Innes to Harvey P. Yale, in June, 1857.

Yale made releases of lots from time to time as Stewart sold, under an arrangement with Stewart whereby the proceeds of sales were to be used towards paying off the Ball and Wood mortgages, and these transactions continued up to the sale. About the time when the foreclosure decrees were rendered, Yale and William H. Stewart made an agreement whereby Stewart was to negotiate for means to pay off the decrees, and they were to divide the surplus;—Yale reserving the right to grant land necessary for the track of the Detroit & Milwaukee Railway.

Here begins some conflict and confusion of testimony. It appears that Wm. H. Stewart made some arrangement with David to procure the money. He says he proposed to David to raise a part, and that the balance would be contributed by the purchasers of lots. There is no question but what the decrees were intended to be canceled in this way. David, who in some important respects does not tell the same story as William, says that William got a friend to raise two thousand five hundred dollars, and that David raised the same amount and brought the five thousand dollars to Michigan to carry out the plan, but that when he came here his brother reported the rest could not agree, and so the matter fell through; and that after the sale he bought out Ball on his own account.

INNES v. STEWART.

Without going into detail, we think these facts are apparent. The whole plan was under the guidance and procurement of William Stewart, who had agreed to do what he could to get the decrees settled. He dissuaded the purchasers in some instances, and probably in many, from bidding at the sale, by promises to have their rights protected, which were afterwards carried out by David. The sale to Ball for less than a quarter of the price he immediately received from David Stewart is evidence enough of some peculiar influence attending the transactions. We cannot come to any other conclusion than that means were designedly used to prevent a sale under the usual competition, and that the property which David came out to redeem and then purchased for the whole amount of the decrees, would never have been sold to Mr. Ball at a nominal price unless means had been used to secure such arrangements as would enable David to be sure of obtaining it. And in this whole matter David and William are shown to be practically one. The subsequent dealings are as plain as the earlier ones.

There is no doubt William Stewart was bound to clear off the decrees. Whether this obligation was due to Innes or not, is not clearly shown,—although the part played by the sixteen thousand five hundred dollar mortgage seems to indicate a connection between that and the bond of indemnity. This is not definitely established. But the interference to prevent a fair and usual sale to the highest bidder is enough of itself to estop the parties from claiming a deficiency which they have been the means of creating.

We think, therefore, that this suit brought ten years after these arrangements, and never authorized by the proper court, is not a fair suit, and is meant to enforce a liability which the parties are estopped from asserting.

The decree below, which was in favor of Innes, should be affirmed, with costs.

The other Justices concurred.

AURORA FIRE & MARINE INS. CO. v. KRANICH.

The Aurora Fire & Marine Insurance Company v.
Elizabeth Kranich.

Insurance: Proofs of loss: Time: Waiver. It is competent for an insurance company to waive strict compliance with the terms of their policies as to furnishing proofs of loss; and where it does waive such proofs, either expressly or by a course of conduct calculated to throw the insured off his guard, as by a distinct refusal to pay the loss, based upon some other defense, so that proofs are not furnished within the time fixed in the policy, it cannot afterwards take advantage of the delay and set it up as a defense to an action upon the policy.

Proofs of loss: Policy: Default: Forfeiture: Construction. The query is suggested, whether where the policy required proofs of loss to be furnished within a specified time but did not declare the effect of a failure to furnish the same as required, while for a violation of other provisions of the policy it is expressly provided that the company shall be absolved from all liability, the failure to furnish proofs within the time fixed would in any case deprive the insured of all rights.

Insurance: Policy: Vacancy of premises: Construction. The provision in a policy that "if at any time during the continuance of this policy * * * the insured property * * * shall become vacant or unoccupied" the insurer shall be absolved from all liability, is held to have no application to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact.

Insurance: Vacancy of premises: Construction. Under a policy containing such a provision, if the property is unoccupied when the risk is taken, with the knowledge of the insurer, but is afterwards occupied for a time, the insurer is liable, though the property at the time of the loss had again become vacant and unoccupied, in the absence of any provision in the policy requiring the insured to have and keep the property occupied. The risk is in no way increased from what it was when the policy issued; and the policy failing to make provision for such a state of facts, the law will not step in and relieve the insurer from responsibility.

Insurance: Renewals. Renewals, though amounting to a new contract, in no way change the terms and conditions of the original policy except as they continue it in force, but the rights of the parties are governed by the provisions of the policy as originally issued, except as the same are affected by any waiver that may have arisen in the meantime.

Waiver: Insurance: Policy: Renewals. While a knowledge of facts brought home to the company at the time the policy is extended by renewal, may operate as a waiver of some of the provisions of the policy, it cannot operate to incorporate new provisions into the contract.

Insurance: Vacancy of premises: Notice: Waiver: Renewals. If the agent who issued the policy, or who renewed the same, had knowledge that the property was at the time unoccupied, the company cannot defend under a clause providing that if at any time during the continuance of the policy the property should become vacant or unoccupied the com-

AURORA FIRE & MARINE INS. CO. v. KRANICH.

pany should be absolved from all liability; the issue or renewal of the policy with such knowledge would be a waiver of this provision.

Heard April 6. Decided April 18.

Error to Superior Court of Detroit.

Otto Kirchner, for plaintiff in error, cited: *Campbell v. Charter Oak Ins. Co.*, 10 Allen, 213; *N. Y. Central Ins. Co. v. Watson*, 23 Mich., 486; *Security Ins. Co. v. Fay*, 22 Mich., 467. He argued that the failure to furnish proofs of loss within the time prescribed, and the violation of the provision as to the property becoming vacant or unoccupied, were complete defenses unless there had been a waiver by conduct which had misled plaintiff to her prejudice.

1. There was no evidence of waiver of the condition as to occupation of the insured premises. It is immaterial whether the agent knew the premises were vacant at the time of issuing the original policy. During the time that contract was in force, no loss occurred, and no claim is made under it. Each renewal was a separate contract, and the rights of the parties must be viewed with reference to the facts as they existed at the times these were effected. Ryman was the last occupant, and the company's agent had notice of his occupancy and was never informed of his removal; and yet the court left it to the jury to say whether the agent knew the premises were unoccupied when the last contract for insurance was made. There was no evidence to support such a charge, but, on the contrary, all the evidence tended in the opposite direction.

2. There was no waiver of proofs of loss. The mere expression by the agent to the insured of his opinion that "the company was not allowed to give (her) any thing because the policy said (she) should notify the company if there was any body in the house, and that they did not owe (her) a cent," was not a refusal to pay upon the sole ground that the premises were not occupied as required by the policy, because no demand for payment was made and no money was then due. There was no evidence of any refusal on the part of the company to pay, based upon the ground that the premises were not occupied, until sixty days after the proofs had been sent, and long after the time limited for making them had expired. And the insured premises were described in the policy as "occupied by a tenant."

AURORA FIRE & MARINE INS. CO. v. KEANICH.

Moore, Canfield & Warner and *Hoyt Post*, for defendant in error, as to proofs of loss, called attention to the fact that the policy requires the assured to "forthwith give notice" and "in thirty days deliver" the prescribed proofs of loss, and does not in terms require the proofs to be furnished in thirty days from the date of the loss; and proofs were furnished within thirty days from notice, and the notice was within a reasonable time. And the policy nowhere provides that failure to furnish the proofs within the required time shall defeat the policy, while failure to perform other conditions specified are expressly made to absolve the company from all liability. This provision should be literally construed.

But if the provision is binding and imperative and open to the construction claimed for it by the company, it was waived by the action of the company's agents, by their action in basing their claim that the company was not liable on the policy, upon the sole ground of the vacancy of the premises. Such provisions may be waived, even after forfeiture: 29 *Mich.*, 241; 57 *Barb.*, 518; 5 *Lans.*, 275; 25 *Mich.*, 56; 4 *How.* (*Miss.*), 567; 20 *Ill.*, 557; 2 *N. H.*, 341; 4 *Bing. N. C.*, 229; *Chitty on Bills*, 501.

The want of occupancy of the premises under the facts did not operate as a forfeiture of the policy. There was sufficient evidence to show a waiver by the company of this condition. The company's agent knew at the time of issuing the policy that there was nobody living in the house; and the company was bound by the acts of its agent; and his knowledge respecting the occupancy of the premises was the knowledge of the company: 12 *Mich.*, 203, and cases cited; 21 *Mich.*, 246; 22 *Mich.*, 159; 30 *Mich.*, 41; 33 *Mich.*, 143, and cases cited. And a waiver under the original policy extends to all subsequent renewals thereof: *People's Ins. Co. v. Spencer*, 53 *Penn. St.*, 353; but the agent, moreover, had like notice at the time of issuing the subsequent renewals. The question of waiver was one of intent, and was properly submitted to the jury under the evidence, and their finding is therefore conclusive.

MARSTON, J:

Defendant in error brought her action to recover a loss under a policy of insurance issued and delivered by plaintiff in error, April 12, 1872, and renewed annually thereafter, the last renewal being April 12, 1875, which continued the policy in force one year from that date. The two principal

AURORA FIRE & MARINE INS. CO. v. KRANICH.

facts relied upon as a defense were, *first*, a failure to furnish proofs of loss according to the terms of the policy, and *second*, that at the time of the loss, August 12, 1875, the buildings insured were vacant and unoccupied. The provisions of the policy applicable to these defenses were as follows:

"Such loss to be payable at their [the defendant's] office in Cincinnati, Ohio, in sixty days after the proofs thereof satisfactory to this company [defendant], made and provided by the assured in accordance with the requirements of this policy, are received at said office of the company."

"The assured shall forthwith give notice to the [defendant] company of any loss, and in thirty days deliver at the office of the company in Cincinnati, Ohio, either personally or by agent, mail or express, a detailed inventory and particular account in writing of such loss, signed and sworn to by him, stating what particular property has been lost or damaged, and what the loss or damage consists in, and whether any and what other insurance has been made on the property, and building containing the property insured; about the cash value at the time of the loss of the subject insured; the interest of the assured; in what general manner (as to trade, manufacture or otherwise) the building insured or containing the property insured, and several parts thereof, were occupied at the time of the loss; and who were the occupants of such building; and copies of the written portions of all policies thereon."

"If at any time during the continuance of this policy, * * * the insured property, or buildings containing the same or any portion thereof, shall become vacant or unoccupied; * * * this company shall be absolved from all liability under this policy."

The charge of the court (b) in reference to waiver of

(b) "The proof of loss required by the terms of this policy is to be furnished within a certain time. This time having been fixed, and the parties agreeing to it, they were bound by it, and if the party fails to abide by the terms of his agreement, then he forfeits his right under the contract. He must be bound by the terms of the contract, as he made it. But notwithstanding this obligation on the part of a party to furnish the proofs within

AURORA FIRE & MARINE INS. CO. v. KRANICH.

proofs of loss by the company was, as to the facts referred to therein, fully sustained by the evidence introduced on the trial. The law is well settled, we think, that the company may waive strict compliance with the policy in this respect, and that where the company does, either in express terms waive proofs of loss, or by a course of conduct calculated to throw the insured off her guard, as by a distinct refusal to pay the loss, based upon some other defense, so that proofs are not furnished within the time fixed in the policy, the company cannot afterwards come in, and take advantage of the delay as a defense to the action.—*The Hibernia Insurance Co. v. O'Connor*, 29 Mich., 241.

It is also worthy of notice that the policy does not declare the effect of a failure to furnish proofs of loss within the time mentioned, while for a violation of its provisions in other respects it expressly provides that the company shall be absolved from all liability under the policy. It would be at least a question of some doubt, whether a failure to furnish proofs within the time fixed, would deprive the insured of all rights, even if there had been no waiver in this case. As, however, the jury, from the evidence submitted, and under proper instructions, found a waiver on the part of the company, it is perhaps unnecessary to decide what the effect of a failure would have been in case there had been no waiver.

The evidence seems to have been clear, and in effect un-

the proper time, and the right of the company to insist upon it in case of insurance, there may be a waiver. This is a right adopted for the benefit of the insurance company, and if the company chooses to waive it, it can do so."

The court further instructed the jury: "Mere silence is not to be taken as a waiver of the right of the insurance company to insist upon a strict compliance with the contract. But where there are other acts done, as acts have been done here, either by the company or its agents, you may take these acts into consideration, in order to discover whether there has been any waiver. In this case two acts are mainly relied upon by counsel for the plaintiff. Those two acts are what was said by Mr. Duvernois, as the agent of the company, and the act of the company in the letters written to the attorneys, when communicating with the home office as to this matter. The act with which Mr. Duver-

AURORA FIRE & MARINE INS. CO. v. KRANICH.

disputed, that at the time the policy was first issued in April, 1872, the buildings were unoccupied, and that the agent who issued the policy was informed of this fact. Such being the case, had they remained unoccupied even up to the time of the loss, there can be little or no doubt but that the insured would have been entitled to recover. The company could not insure vacant buildings, take and retain the premium, and in case of loss relieve itself from responsibility, under a claim that it was not liable unless they were occupied, unless some provision was inserted in the policy, by which the insured agreed they should not be permitted to remain vacant. Besides, the provision inserted in this policy as to vacant buildings has no application to buildings that are vacant at the time the policy is issued, to the knowledge of the company. The provision is, that "if at any time during the continuance of this policy * * * the insured property, etc., * * * *shall become vacant or unoccupied.*" Clearly this refers and applies to property occupied at the time the policy is issued and afterwards becoming vacant. If, however, the property is unoccupied when the risk is taken, and there is no provision in the policy requiring the insured to make any change in this respect, we are of opinion the company would be liable under the policy for a loss occurring at a time when the property was vacant, even although it might appear that intermediate the date of issue of the policy and date of loss the

nois is most immediately connected is simply a statement on his part, when informed of the loss here, that the company would not pay, because the premises were not occupied. In other words, as they claim, the statement was substantially this: 'You have not carried out the terms of the contract providing for the occupancy of the premises, and we shall rely upon that as our defense.' If that was the effect of it, and if that was intended to be the effect of the statement, then you may consider that as a waiver, or take the fact into consideration as a waiver of the right to insist upon proof at the proper time. On the other hand, if such is not, in your view, the fair inference to be derived from the statement,—I say, if the facts as they actually occurred do not lead to that inference,—then there was no waiver of this right, and they had a right to insist upon the terms of the policy being carried out as to the proofs."

AURORA FIRE & MARINE INS. CO. v. KRANICH.

property had been actually occupied. Under such circumstances the risk is in no way increased or changed. The property is in no worse situation at the time of the loss than it was when the policy was issued. The policy, although framed to carefully guard the rights of the company, makes no provision for such a state of facts, and the law will not step in and relieve the company from responsibility, where the provisions of the policy have not been violated by the insured, and where the state of the property has at all times during the continuance of the policy been in as favorable a condition as it was when the policy was issued.—*May on Ins.*, § 191.

The renewals, although amounting to a new contract, in no way changed the terms and conditions of the policy, except as they continued it in force. The rights of both parties, no matter how often a policy of insurance may have been renewed, are still bound by the provisions of the policy as originally issued. Its terms are neither enlarged, restricted or changed. True, there may be such a knowledge of facts brought home to the parties at the time the policy is extended by renewal as would amount to a waiver of some of its provisions, but the same result would in most if not in all cases follow where the facts were brought to the knowledge of the parties at any other time. While such information can be used to show a waiver, it is not admissible for the purpose of incorporating provisions into the contract not previously contained therein.

In this case there was evidence tending to show that the agent of the company had at several times been informed that different tenants had been occupying the premises, and that for portions of the time they were vacant. The court refused to instruct the jury that "there is no evidence in the case, that at the time of the last insurance the company had knowledge of the fact that the premises were vacant." The instructions given upon this branch of the

AURORA FIRE & MARINE INS. CO. v. KRANICH.

case (c) were, we think, quite as favorable, if not more favorable than the plaintiffs in error were entitled to. The other errors assigned are immaterial.

The judgment must be affirmed, with costs.

The other Justices concurred.

(c) The court charged the jury on the question of occupation: "Although the policy in this case specifies that the premises were occupied by a tenant, still if the agent of the company knew that, as a matter of fact, when the policy was originally issued, the premises were not occupied by a tenant, then the plaintiff is entitled to recover. That applies to the policy as originally issued.

"It appears that there were certain renewals here, running through three or four years. Now, if at the time of these renewals the buildings were represented as being occupied, and subsequently they became vacant, and neither the agent nor the insurance company had any knowledge of such vacancy, then the insurance policy would become void, because by one of the very terms of this insurance policy, which we have read to you, we discover their intention is to insure occupied property. Now, in this case, if when the policy was originally taken out, or at any subsequent time, when the policy of insurance was renewed or continued, there was a representation made that these premises were occupied, and subsequently they became unoccupied and were destroyed while they were so unoccupied, and neither the agent nor the company had any knowledge of this, though the policy can be operative, then the plaintiff, so far as this point has any bearing, would not be entitled to recover.

"You will take all the testimony into consideration, and see whether there was a representation that these premises were occupied at that time, and if there was a representation that they were so occupied, and the premises were afterwards destroyed while they were vacant, the plaintiff is not entitled to recover."

And the defendant excepted to that part of the charge which left it for the jury to say whether the agents had any knowledge of the vacancy of the property at the time of the renewals.

And the court further charged the jury: "Still further, if you shall come to the conclusion that the agent knew that the premises were unoccupied at the time of issuing the policy, or at the time of any of these renewals, and that notwithstanding he issued the renewals, then the second question will be whether there was a waiver of the proof of loss."

VAUGHN v. NIMS.

Sewell S. Vaughn v. Dwight Nims and another.

Foreclosures: Computation of amount due: Reference. It is competent for the court in foreclosure cases to make a decree without a reference to compute the amount due; and the court should always pass for itself on the testimony.

Foreclosures: Decree: Amount: Installments accruing after bill filed. While the statutes and practice under them require a new inquiry into any installments accruing after decree (*Brown v. Thompson*, 29 Mich., 74), the practice has always prevailed of giving decree for every thing due at the time it is granted, and it is sanctioned in this case.

Mortgagees: Taxes: Foreclosures: Decree. It is competent for a mortgagee to protect his mortgage interest against taxes, and the amount so paid may properly be included in a foreclosure decree.

Foreclosures: Decree: Sales: Entirety: Parcels. A decree allowing a sale as an entirety will not be disturbed for that reason, where the land was originally described as one lot, and there is no showing that it should be sold in parcels.

Submitted on briefs April 10. Decided April 18.

Appeal in Chancery from Kent Circuit.

Joslin & Kennedy, for complainant, to the point that it was proper for the court to make computation of the amount due, cited: *Ireland v. Wookman*, 15 Mich., 253; that a decree for the whole amount due was proper: *Comp. L.* 1871, §§ 5147, 5157-9; *Adams v. Brown*, 7 Cush., 220; *Whitney v. Eichelberger*, 16 Ia., 422; *Lyman v. Sale*, 2 Johns. Ch., 487; *Smalley v. Martin*, 1 Clark (N. Y.), 293; *Rice v. Crabb*, 12 Wis., 179; *Walker v. Hallett*, 1 Ala., 379; as to the sale as an entirety: *Harris v. Makepeace*, 13 Ind., 560; *Denny v. Graeter*, 20 Ind., 20; 15 Ind., 210; *Woodhull v. Osborne*, 2 Edw. Ch., 617; *Griswold v. Fowler*, 2 Abb. Pr., 238.

Smith, Nims & Erwin, for defendants, cited: *Perkins v. Perkins*, 16 Mich., 166; *Brown v. Thompson*, 29 Mich., 74; *Smith v. Rumsey*, 33 Mich., 189, and cases cited; *Comp. L.*, §§ 5157-61; *Graves v. Niles*, Harr. Ch., 334; *Hammond v. Place*, Harr. Ch., 438.

CAMPBELL, J:

This is a foreclosure case, in which the chief defense was usury. The decree having allowed this defense and

VAUGHN v. NIMS.

fixed the debt equitably, the cause is appealed by the defendants upon some minor grounds.

It is first claimed that the court should not have decreed without a reference to compute the amount due; and that the decree should not have covered any thing which has fallen due since the suit began. These points are not well taken. The court should always pass for itself on the testimony, which in this case was all aimed at determining the amount of the mortgage debt. And while the statutes and the practice under them require a new inquiry into any installments accruing after decree (*Brown v. Thompson*, 29 Mich. R., 74), the practice has always prevailed of giving a decree for everything due at the time it is granted. In this case the whole amount had become due, and no payments were pretended.

We have found no testimony in the printed record concerning an item of taxes of fifty-seven dollars and thirty-four cents, included in the decree. But it appears that there is such a voucher in the original record, and there can be no doubt of the propriety of allowing a party to protect his mortgage interest against taxes. The objection to its allowance is not well taken.

As there was nothing to show that the land should be sold in parcels, and as it was originally described as one lot, there is no reason for disturbing the decree which allows a sale as an entirety.

The decree must be affirmed, with costs.

The other Justices concurred.

MATTER OF GEORGE W. WOOL.

In the Matter of George W. Wool, an Attorney and Solicitor.

Attorney: Fraud: Abuse of confidence: Equity suit: Proceedings to disbar: Practice. Where a suit in equity against an attorney and solicitor, charging him with fraud under circumstances implicating him in a gross abuse of confidence, has been before the court on the facts and the court has decreed against him, an order to show cause why he should not be struck from the rolls may properly be based on the decree, or be incorporated in the decree itself.

Practice: Proceedings to disbar an attorney. Upon an order to show cause based upon such a decree, which has been rendered after a full hearing upon the very facts involved, there is no reason why any reference to take further evidence on the main facts should be allowed, unless on a showing which would justify a rehearing.

Proceedings to disbar an attorney: Showing in defense. In the present case, however, the respondent was permitted to make such showing as he deemed proper, which he did by affidavits.

Questions of fact: Chancery causes: Opinion of circuit judge: Appellate court. The decision of the circuit judge on the facts in a chancery cause is entitled to great weight with the appellate court, he being supposed to have some better personal knowledge of the witnesses than is to be presumed in the appellate court; but the latter court has no right, if plainly convinced, to abdicate its own duty of determining every case upon its own view of the facts.

Determination of questions of fact: Belief: Reasons. It is one of the difficulties attending all tribunals passing upon facts, that the reasons for believing particular witnesses, or particular testimony, in preference to others, cannot be defined; but they must nevertheless act on the belief which the testimony creates; and that belief does not usually involve the rejection or acceptance of all that is said by any particular witness.

Proceedings to disbar an attorney: Fraud: Defense: Immaterial matters. A showing that relates only to the good character of one who testified as a witness on respondent's behalf in the equity suit, where his testimony tended only to contradict that of complainant as to the manner in which the latter claimed the fraud had been brought about, and was not conclusive on the main fact, is not a very pertinent answer to an order to show cause why respondent should not be disbarred for the fraud and abuse of confidence of which he had been decreed guilty in the equity suit.

Frauds: Character of person defrauded. Nor is a showing of bad character of the complainant in the equity suit very material to the issue on such order. The law does not deny its protection against frauds to all but the virtuous, though it may require strong proof that they have been defrauded.

Heard April 10. Decided April 18.

Proceedings to disbar an attorney.

MATTER OF GEORGE W. WOOL.

Otto Kirchner, Attorney General, for the People.

F. A. Baker, for respondent.

CAMPBELL, J:

A decree was made at the last term, in the case of *Bel-lair v. Wool and Prentis*, which rested on a fraud charged to have been practiced by Wool on complainant, under circumstances indicating a gross abuse of confidence. We thereupon entered an order to show cause why he should not be struck from the rolls.

Upon the return of this order, certain affidavits were presented, to which reference will be made directly, and a question was suggested as to the correct practice in such a case as this, and a suggestion was made that a reference ought to be granted.

The charges made against Wool in the bill of complaint, which formed the only basis of action in that case, were such as, if true, were enough to render him deserving of punishment. If no such suit had been brought, and a complaint had been laid before us against him, a full hearing on evidence taken in some adequate way would have been necessary. But no method of examination adopted in summary proceedings could have been so full or suitable as that furnished by the issues and hearing in an equity cause, where the witnesses are examined and cross-examined in such manner as the parties desire, and there is time for an exhaustive scrutiny. After such a hearing there is no very good reason why any further showing on the main facts should be had, unless under circumstances which would justify a rehearing. Accordingly, where the court has itself heard the cause and passed upon the facts, as is done in equity, an order to show cause is properly based on the decree, and might have been incorporated in the decree itself. This was the practice followed in *Goodwin v. Gosnell*, 2 *Collyer's Ch. R.*, 457, where reference is had to a similar practice adopted by *Lord Rosslyn* in an unreported case.

MATTER OF GEORGE W. WOOL.

Dungez v. Angove, found in the Registrar's books. The law courts act always in a summary way on such complaints, whether based on convictions or new charges, and the Queen's Bench, where the master of the crown office occupied a peculiar position, is the only law court which allowed the testimony to be taken out of court before him, though still acting itself on that evidence. See *3 Chitty's Gen. Pr.*, 38; *Smith's Case*, 1 Br. & Bing., 522; *1 Tidd Pr.*, 88, and cases cited.

In the case of *Goodwin v. Gosnell*, there was evidence of subsequent good conduct and reparation, which induced the court to regard the respondent as not so guilty morally as to render it necessary to inflict the extreme punishment which would otherwise have been ordered.

In the present case we were disposed to permit the respondent to make any showing he thought proper, leaving its effect to be considered afterwards. The showing has been confined to affidavits intended to support the credit of Mr. Minock, one of the witnesses for the defense, and to corroborate Wool in a few specific facts which he had sworn to, as well as to assail the reputation of the complainant, Mrs. Bellair, and her husband, who were main witnesses for complainant's case. There is also a suggestion, purporting to be founded on statements of the judge who tried the cause below, indicating that his belief was based on discrediting the complainant's testimony.

So far as this latter point is concerned, it had its due weight in our consideration of the appeal. The fact that a judge who has perhaps some better personal knowledge of the witnesses than is to be presumed in an appellate court, has believed one side rather than the other, must always weigh with the latter, who will not overcome the presumption of his correctness unless plainly convinced. But no appellate court has a right to abdicate its own duty of determining every case upon its own view of the facts. Every party has an absolute statutory right of appeal; and it would be wrong and unjustifiable to give the form of a

MATTER OF GEORGE W. WOOL.

remedy and yet hold that the decision below must govern the court of review.

In considering the grounds now laid before us, we have felt it proper to examine again into the record, as we feel no desire to take any step which we can fairly avoid which will lead to such serious consequences as the loss of professional standing.

It is one of the difficulties attending all tribunals passing upon facts, that the reasons for believing particular witnesses or particular testimony in preference to others cannot be defined. Every tribunal passing on facts must act on the belief which the testimony creates. That belief does not usually, as it certainly does not with us in this case, involve either the rejection or acceptance of all that is said by any particular witness. In our previous decision we abstained from any elaborate discussion of the conflicting facts, and contented ourselves with the conclusions which had impressed us all. We do not now intend to do much more; and we should have abstained entirely from any further statement, had it not been compelled by the peculiar nature of the new showing which we have no doubt rests on some misapprehension as to our former views.

A considerable and very respectable showing is presented in favor of the character of Mr. Minock, who, as notary public, took the acknowledgment of the deed which we held fraudulent. The present showing seems to be based on the assumption that we could not have reached our conclusion without regarding him as involved in the fraud.

Upon this it is sufficient to say, that if he acted, as he claims to have acted, as a mere notary, having no special knowledge of the transaction in issue, it would have been very strange if his memory had retained a minute recollection of the surroundings; and his testimony, however honest, would deserve little consideration if opposed to the probabilities, and to facts about which there can be no great doubt. It is a very common thing for an honest witness to confuse his recollection of what he actually observed with

MATTER OF GEORGE W. WOOL.

what he has persuaded himself to have happened, from impressions and conclusions not really drawn from his own actual knowledge. Mr. Minock did not remember clearly what he did in regard to a separate acknowledgment, aside from his belief founded on his usual practice; and yet that was a fact concerning himself and about which he would have been likely to recall the truth, as he would as to things done by others. It would have been suspicious if he had paid extraordinary attention to a transaction which, if an honest one, would have presented no strange features; for very few notaries can be found who after so great a lapse of time could possibly recall the ordinary incidents of a conveyance. If he was unsuspicious, it would not be difficult for a shrewd person, intending a fraud, to handle papers in such a way as to escape detection.

We have not regarded any of the testimony of the parties concerning the manner of the fraud as necessarily correct, because they were equally unsuspicious. But they could not be ignorant concerning the central fact of a fraud committed by some means, and by some deception as to what was signed.

Affidavits of the bad character of Mrs. Bellair could not have been received to affect her credit if the affiants had been sworn upon the stand. If we regarded them as important, we should desire cross-examination, as well as some information concerning at least a part of these persons, before we should be justified in trusting to such an impeachment.

But the record shows that no attempt was made even by cross-examination to destroy the credit of the complainant and her husband as witnesses, and this was not accidental, but intentional. We are nevertheless satisfied that Mrs. Bellair,—as appears plainly from the record,—is not a person of unimpeachable character; and we have been mindful of this in scanning her story, which is in some respects, as we think, incorrect, but which in the one leading feature of the case we believe to be true.

The same circumstances which show her character show

MATTER OF GEORGE W. WOOL.

that she had intimate and improper relations with Wool, and was much under his influence; and while her statements require scrutiny, they are no more open to criticism on this account than Wool's, who was in the same moral complications, and equally interested in the result. An opening of the subject of her character would not have been one-sided.

Oliver Bellair has no interest whatever in the case; and while we are not impressed with the idea that his testimony should not be rigidly examined, he is nevertheless, so far as motives go, in a better position than any of the parties themselves.

The minor surroundings cannot be very decisive in determining the leading fact. Wool was charged with defrauding Mrs. Bellair by procuring a deed to himself and Prentis of an interest of Oliver Bellair, in future enjoyment, of a valuable estate in Detroit, when it was supposed the conveyance was made to Mrs. Bellair. The interest was one-eighth part of a tract devised by Bellair's mother. The complainant's claim was, that her husband, from whom she had separated, had agreed to convey it to her for a small sum, in view of her having custody of their child. Bellair swore to this positively, as did Mrs. Bellair, and their testimony was corroborated by disinterested evidence. The substitution, or some other deception, in passing the deed, is supposed to have taken place at Minock's office.

Wool in answering did not undertake to set out when or how he made any bargain for Bellair's interest for himself and Prentis, and gave no explanation of it. His testimony, which in the most important portions was given under leading questions of his own counsel, is equally silent on this subject. The matter was one which was important, and which he was directly called on to explain; and he leaves it in obscurity, contenting himself with controverting complainant's testimony.

The production of the original deed, which was not before us on the first hearing, and which we had supposed might have been incorrectly printed, presents some very pe-

MATTER OF GEORGE W. WOOL.

cular appearances, which we cannot account for on any theory of defendant's testimony. Mrs. Bellair's name is written over an erasure not explained by any one, and there are singularities about both signatures. But this we do not regard as in itself very important. It appears that instead of taking from Bellair a quit-claim or transfer of his interest in one-eighth of his mother's estate, this deed, if genuine, conveyed or purported to convey by full present warranty a legal title in fee simple to the whole estate, and not to the future enjoyment of an undivided eighth part of it. It is very certain Bellair never agreed to make any such conveyance to any one; and it is equally clear that he never could have signed such a deed without having been deceived as to its contents. If, as some of the witnesses indicate, he examined a deed at Minock's office, in such a way as to learn its contents, this could not have been the deed he examined. Neither Bellair nor his wife could possibly have supposed they were signing such a deed as the one before us, even if Wool had purchased the interest he claims. It is so manifest that this deed, on any possible theory, was a fraud, that the testimony upholding it is entitled to no credit; and the substitution of such a document for something else can hardly be doubted. It is not even pretended that any bargain was ever made for such a conveyance, and the fraud is palpable. It is not made much worse, if at all, by the theory of the complainant's bill.

We need not repeat the further reasons which have convinced us that the case was made out by the proofs. The law does not deny its protection against frauds to all but the virtuous, although it may require strong proof that they have been defrauded. We think the present case is fully proved.

An order must be made removing respondent from his office of attorney.

The other Justices concurred.

36 MICH.—39.

PEOPLE v. HUSBAND.

The People v. Levi Husband.

Criminal law: Fraudulent conversion: Trunks: Checks: Delivery: Larceny.

Under the statute (1 Laws 1875, p. 195), making one to whom money, goods, or other property the subject of larceny shall have been delivered, and who shall embezzle or fraudulently convert the same to his own use, etc., guilty of larceny, it is a sufficient delivery of trunks and baggage, where the checks for the same are delivered to respondent and he, acting under the authority which the delivery of such checks gave him, has assumed the right to and has exercised acts of possession and control over the trunks and baggage.

Baggage checks: Hotel keeper: Lien: Fraudulent conversion. The fact that a hotel keeper to whom checks for baggage have been delivered by a guest, would have a lien upon the baggage for the bill of such guest, would give him no authority to dispose of the property as his own, and would not justify his conversion of the same to his own use, or of itself preclude his being held under said statute, on the ground that he was a bailee with a special property in the goods.

Fraudulent conversion: Hotel keeper: Baggage: Good faith. And instructions to the jury that in case they found defendant claimed to have a lien upon the goods, and thought he had a right to pledge the goods by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods, are as favorable in this regard to the respondent as he is entitled to demand.

Submitted on briefs April 10. Decided April 18.

Exceptions from Kent Circuit.

Otto Kirchner, Attorney General, for the People, cited: 2 East P. C., 555; Rex v. Williams, 1 C. & K., 195; Archb. Cr. Pr. & Pl. (notes), p. 361-2 (2).

Atwood & Corbitt, for respondent, cited: 2 Bish. Crim. L., 829; and cases cited; Leake v. The State, 10 Humph., 479.

MARSTON, J :

An information was filed against the respondent charging him with having fraudulently and feloniously secured and converted to his own use, certain trunks and other property of the value of fifty-five dollars, without the consent of the owner thereof, and that he thereby in manner and form aforesaid, feloniously did steal and carry away the same contrary to the statute, etc.

PEOPLE v. HUSBAND.

The statute under which the information was filed reads as follows:

"If any person to whom any money, goods, or other property which may be the subject of larceny, shall have been delivered, shall embezzle, or fraudulently convert to his own use, or shall secrete with intent to embezzle, or fraudulently use such goods, money, or other property, or any part thereof, he shall be deemed by so doing to have committed the crime of larceny."—*Act No. 168, Laws 1875, Vol. 1, p. 195.*

The evidence introduced tended to show that the respondent was a hotel keeper, and that as such he had received from the complaining witness, who was stopping at his house, three checks, being the checks to her trunks then at the depot, with a request that he bring the trunks to the house; that complainant remained at his house some five weeks; that although she ascertained that her trunks had been removed from the depot, the same had not been brought to the respondent's house; that respondent in the meantime had been to Detroit, and on his return she spoke to him about her trunks, when he informed her they had been sent to Detroit but he would have them back in a day or two.

Evidence was also given that on April 24th, 1876, some eight days after respondent had received the checks, he was in Detroit and that he then handed the checks to the proprietor of a hotel in that city who handed them to one of the hotel porters; that respondent then asked the porter to bring the baggage which the checks represented to the house, which was done; that respondent left the hotel before the baggage was brought in and did not return, and that the baggage thus brought into the hotel in Detroit was the trunks and property of complainant. The property was afterwards found in the Detroit hotel, where it was detained for respondent's hotel bill. Other evidence was introduced, but the above is sufficient in order to enable us to understand the questions raised. The respondent was convicted and the case comes here upon exceptions before

PEOPLE v. HUSBAND.

sentence. It is insisted that the property was in the hands of the respondent as bailee; that he had a special property in the goods, and that under such circumstances they were not the subject of larceny; also that the property was never delivered to the respondent, that the checks only were delivered, and that the property remained in the possession of the railroad company.

It is true that the complaining witness did not deliver to the respondent the actual manual possession of the property, but she did deliver to him that which gave him the right to the control and possession of the property, and that acting under the authority which she gave him, he assumed the right to and did exercise acts of possession and control over it.

The evidence tended to show that the disposition of the property as made by him was not only without authority in fact from the owner thereof, but that it was in fact in direct violation of the authority she had given him, and was a conversion of the same to his own use. The fact that she was a guest at his hotel, and that he would have a lien upon this property for the amount she might be owing him, would not give him authority, under the facts appearing in this case, to dispose of the property as his own. His good faith and belief that he had such right, would show a want of any criminal or wrong intent, and the jury were so instructed. An examination of the charge shows the case to have been presented to the jury in such a form that the respondent has no legal cause of complaint. They were instructed in case they found that the respondent had absolute control over the property, by means of the checks, that such would be a sufficient delivery of the possession to him. They were also instructed that in order to find a conversion, they must find an actual conversion by the respondent to his own use, and also an intent existing at the time of such actual conversion, to thereby deprive the owner of her property therein, and to use it himself; that in case they found an actual possession and actual conversion in Detroit,

PEOPLE v. HUSBAND.

and that respondent there assumed absolute control over the property as his own goods, they must also find, in order to convict, the intent thereby to deprive the owner of her property therein absolutely and entirely, that if he had any intent other than this the offense would not be made out. The jury were further instructed that in case they found he claimed to have a lien upon the goods, and thought he had a right to pledge the goods by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods.

As we discover no error, it must be so certified to the circuit court, and that judgment be entered on the verdict.

The other Justices concurred.

Henry Curkendall v. The People.

Curtilage: Dwelling house: Barn: Separated by public highway. A barn situated fifteen rods from the dwelling house, with a public highway passing between them, and a yard between the barn and the highway, is held not to be within the curtilage of such dwelling house.

Submitted on briefs April 10. Decided April 18.

Error to Hillsdale Circuit.

M. B. Koon and B. P. Shepard, for plaintiff in error.

Otto Kirchner, Attorney General, for the People.

COOLEY, CH. J:

Plaintiff in error was indicted for the statutory offense of feloniously setting fire to and burning a barn and adjoining shed of one Isaac Hagerman, in Amboy, the said

CURKENDALL v. PEOPLE.

barn and shed "being within the curtilage of the dwelling house of him," the said Hagerman.

The evidence showed that the barn was situated some fifteen rods from the house, with a public highway passing between them, and a yard between the barn and the highway. In *People v. Taylor*, 2 Mich., 250, a barn one-third this distance from the dwelling house, but immediately connected with it by a lane, was held to be within the curtilage. But here, to say nothing of the distance, there was a distinct separation from the house by the highway; and the case cited cannot sustain the ruling.

The judgment must be reversed, and the prisoner discharged.

The other Justices concurred.

Carl Schoenberg v. Edward W. Voigt.

Father and son: Services of minor son: Quantum meruit: Character of the service: Embezzlement. In an action by a father to recover on the common counts for services of his minor son in peddling beer, it appearing that the son undertook to answer for any beer he should carry out and for which he should fail to bring back beer tickets or cash, it was competent for the defense to show that the son proved dishonest and embezzled from defendant more than the amount of his unpaid wages.

Evidence: Father and son: Emancipation. It being urged as a defense that the son was emancipated by the father before he engaged with defendant, the exclusion of an inquiry as to whether the son did not ask and obtain permission of his father when he went into service of another person named, will not be held error, where the record does not disclose at what time such other service was entered into, or how long prior to the engagement with defendant; emancipation may take place suddenly and by express arrangement, or it may occur gradually and by conduct implying mutual assent, and even in the latter case it may be brought about in a short time.

Charge to the jury: Requests to charge: Father and son. A request to charge calling for an imperative and unqualified charge, that the father is entitled to the earnings and wages of his minor son, is clearly improper, and its rejection is not error.

SCHOENBERG v. VOIGT.

Requests to charge. A request to charge, which implied a claim by the opposite party which had not in fact been made by him, is held erroneous, and properly refused.

Requests to charge: Obscurity. The rejection of a request to charge that is so obscure as not readily to have been understood by the jury, is not error.

Requests to charge: Propositions of fact: Irrelevant subjects. The rejection of requests to charge which simply embody propositions of fact, and convey no instruction in point of law, or which are not applicable to the case, is not error.

Submitted on briefs April 11. Decided April 18.

Case made from Wayne Circuit.

Bloom & Bloom, for plaintiff.

Griffin & Dickinson, for defendant.

GRAVES, J:

The plaintiff sued on the common counts to recover for services of his minor son. The jury found for defendant, and plaintiff asks a review of certain questions on a case made.

The young man's service was peddling beer.

There was evidence tending to show he had been emancipated by plaintiff, and that on engaging with defendant he agreed to answer for any beer he should carry out and for which he should fail to bring back beer tickets or cash, and that he proved untrustworthy and knavish, and embezzled an amount exceeding all unpaid wages.

Some objections of plaintiff's counsel appear which proceed upon the idea that the investigation into the dishonest and criminal conduct of young Schoenberg was for the purpose of setting off the damages caused by his wrong, against the claim made for his wages. The record is not so understood. The purpose of the proof was not, it is supposed, to make out set-off, but to prove the circumstances of the service, and show that it was not merely worthless, but positively injurious to a large amount. And this was lawful. The action was for what the identical service of

SCHOENBERG v. VOIGT.

the young man was fairly and reasonably worth, and the investigation of that subject necessarily included an inquiry into his behavior and fidelity.

The plaintiff, testifying in his own behalf, stated that his son was born November 9th, 1854, and from the fall of 1874 to the month of May following carried on the wood business with him, but in February afterwards engaged with defendant.

He then, in answer to his counsel, stated further that the young man worked for Captain Ralph a little over a year. His counsel then inquired who gave the son permission to work for Captain Ralph, and the court, on objection, overruled the question. It is argued that the question was a proper one to elicit an answer bearing on the claim that the son was emancipated when he entered defendant's service. There would be force in this if it appeared in any way that the service or going into service for Captain Ralph was not so early as to be too remote in point of time. If on the occasion of the hiring to Captain Ralph the plaintiff's consent was sought, it went to show that emancipation had not then occurred, but it could not weigh in regard to the situation at a considerably later date.

The fact of emancipation may take place suddenly and by express arrangement, or it may occur gradually and by conduct implying that the parent and child have mutually assented to the child's release from parental authority. And in either case the change may be wrought in a short time. Now the record fails to show at what time the young man went into Ralph's service, and therefore the excluded question does not appear to have been material. It does not appear that what was called for by it could have borne on the young man's *status* when he went into defendant's service.

Numerous instructions were prayed. All requested by defendant, except the sixth and ninth, were given. Of the plaintiff's requests, the second, third, and fourth were given in terms, the first, fifth, and sixth with remarks, and the seventh, eighth, ninth and tenth were denied.

SCHOENBERG v. VOIGT.

Plaintiff's first request called for an imperative and unqualified charge that the father is entitled to the earnings and wages of his minor son. This was plainly improper. Instructions upon the point were given under requests made by defendant. The fifth request of plaintiff implied a claim on the part of defendant which had not been made. The remarks of the court on refusing the request were not objectionable. The sixth request was very obscure and the jury could hardly have understood it if it had been given. The observations of the court were not improper. The seventh request simply embodied certain propositions of fact and conveyed no instruction in point of law. And the other requests which were refused, were not applicable. The charge given is exposed to some criticism, but in the main it is substantially correct, and a careful inspection of the whole case leads to the opinion that the jury were not misled, but on the contrary, were brought to a right conclusion.

As no error is discovered of which the plaintiff is entitled to complain, the judgment should be affirmed, with costs.

The other Justices concurred.

Hervey Sullings v. The Goodyear Dental Vulcanite Company.

Evidence: Pleadings: Defense: Decree in another suit: Res adjudicata. In an action to recover damages for the breach of a contract whereby defendant agreed to allow and permit plaintiff to make, construct and use a certain improvement in artificial gums and palates in his profession of dentistry, the breach alleged being the suing out of an injunction, the decree in the injunction suit would not be admissible in evidence as a bar to the present suit where the same was not set up or relied upon in the pleadings.

Pendency of another suit: Plea in abatement. The pendency of another suit involving the same matters, if relied upon at all, must be pleaded in abatement; and it is not a bar.

36 MICH.—40.

SULLINGS v. GOODYEAR DENTAL VULCANITE COMPANY.

Contracts: Permission to use patented improvement: Injunction. The suing out and service of an injunction is held to be a breach of a contract to allow the plaintiff to make use of a patented improvement.

Injunction: Irregular service: Subpoena: Violation of contract. Though one who is served with an injunction and is not served with subpoena may doubtless have the injunction set aside for irregularity, and might possibly under some circumstances be justified in disregarding it altogether, yet where one having a contract permitting him to use a patented improvement is served with injunction at the suit of his grantor, he has a right to treat it as a public and formal declaration on the part of such grantor not to abide by his contract, and is under no obligation, when the necessary steps are not taken to bring him before the equity court in the injunction suit, to present himself there to get rid of the writ of injunction.

Contracts: Breach: Injunction: Irregular service. It does not lie with the party who has caused an injunction to issue in violation of his contract, when sued for a breach of the contract, to say that the other party might have been relieved from the injunction in the injunction suit by producing and proving his contract.

Heard April 11. Decided April 18.

Error to Kent Circuit.

May, Powers and Daniels, for plaintiff in error.

William Ashley and E. A. Maher, for defendant in error.

COOLEY, CH. J:

This action is brought to recover damages for the breach of a contract whereby the defendant agreed to allow and permit the plaintiff to make, construct, and use a certain improvement in artificial gums and palates in his profession of dentistry. The breach of the contract as set up consists in the suing out a writ of injunction. The contract was entered into in 1869, and the injunction was sued out in 1870. The plea, filed in September, 1875, had appended to it a notice that defendant would prove in bar of the suit, a suit pending on the equity side of the circuit court of the United States for the western district of Michigan.

The making of the contract, and the suing out of an injunction afterwards, are established by the finding of the court below. It is not shown, however, that any suit was actually commenced in equity by the service of subpoena or appearance, but it is claimed that the court afterwards ren-

SULLINGS V. GOODYEAR DENTAL VULCANITE COMPANY.

dered a decree in the injunction suit, and it is said, that the court being one of general jurisdiction, it must be taken as a conclusive presumption of law that the court had jurisdiction. It is further urged that the decree would be conclusive of the matters here in controversy, as it would necessarily cover them. It is a sufficient answer to this argument that no such decree is set up or relied upon in the pleadings, and it was not admissible in evidence. All we have of this suit, therefore, is an injunction issued and served without subpoena. The suit that was pending when the plea was filed was commenced in February, 1875. The pendency of that suit, if relied upon at all, should have been pleaded in abatement; it was not a bar to this suit.—*1 Chit. Pl.*, 454. It would seem, therefore, that the only question that the record presents is, whether the suing out and service of the injunction constitutes a breach of the contract to allow the plaintiff to make use of the patented improvement.

Had the defendant in the injunction suit moved to set aside the writ on the ground that no subpoena was served with it, probably it would have been set aside for irregularity.—*Peltier v. Peltier*, *Har. Ch.*, 19. Possibly he might have been justified in disregarding such a service altogether, though this might depend on circumstances. In general a party is bound by an order for injunction of which he has notice, though no writ is taken out.—*High on Injunctions*, § 852; *Kerr on Injunctions*, 638. If, however, an injunction were sued out and served, without any service of subpoena or other evidence of *bona fide* purpose to proceed with the suit, we think a court would hesitate long before imposing any punishment on one who disregarded it. But it is not necessary to consider hypothetical cases; in this case the writ was obeyed, and whether the purpose in suing it out was *bona fide* or not, is not very important. The plaintiff had a right to treat it as a public and formal declaration on the part of the defendant not to abide by the contract recently made with him, and unless the necessary

SULLINGS v. GOODYEAR DENTAL VULCANITE COMPANY.

steps were taken to bring him before the equity court in the injunction suit, he was under no obligation to present himself there to get rid of the writ. There was as to him no *lis pendens* until he was served with process or voluntarily appeared, but there was by the injunction an impediment interposed to the enjoyment of the benefits of his contract. It does not lie with the defendant to say that he might have been relieved from the injunction in the chancery suit, by producing and proving his contract; doubtless he might have done so, but to compel him to do so, the party complainant in that court should have taken the proper proceedings to bring him in.

Our judgment is, that the court below erred in its conclusion, and that the plaintiff is entitled to maintain this action.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

Rebecca K. Heyerman v. Edward Kanter and
another.

Declaration: Common counts in assumpsit: Evidence: Use and occupation.

Under a declaration on the common counts in assumpsit, evidence of the use and occupation by defendants of the plaintiff's store under an agreement therefor at a specified yearly rental, is held inadmissible and irrelevant.

Submitted on briefs April 11. Decided April 18.

Error to Superior Court of Detroit.

Griffin & Dickinson, for plaintiff in error.

Otto Kirchner, for defendants in error.

HEYERMAN v. KANTER.

GRAVES, J:

This action was brought against defendants in error as special administrators of Charles Busch deceased, and the declaration was on the common counts in *assumpsit*, for goods sold and delivered, work and materials, money lent, money paid, money had and received, and money found due on an accounting. There was no count for use and occupation.

Defendants pleaded the general issue. At the trial the plaintiff claimed the right to prove and recover for use and occupation by defendants of plaintiff's store under an agreement therefor at the yearly rent of one thousand six hundred dollars. On defendants' objection that the evidence was not admissible under the pleadings, the court excluded it and the case is brought here to have this ruling revised. The ruling was clearly correct. I am not aware of any decision directly in point, but the doctrine which governs is quite elementary. There was no issue on the pleadings to which the offered evidence could have any relevancy whatever. The essential requirements of a declaration or count upon the cause of action attempted to be proved here are stated in many books, and none of them are contained in this declaration.—*Laves on Plead.*, 492 (mar.); 2 *Saunders P. & Ev.*, 888; 2 *Wheaton's Selw.*, ch. XLI.; *App. to Burrill's Prac.*, 251, 252.

The judgment should be affirmed, with costs.

The other Justices concurred.

FINN v. CORBITT.

Patrick Finn v. Daniel E. Corbitt.

Assignment: Right of action in tort. The right of action in tort for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may be assigned so as to pass an interest to the assignee which may be enforced in a court of law; but the right of action for a tort is not in general the subject of assignment.

Trespass: Assignee: Presumptions. And in an action upon a judgment in trespass by one who claims as assignee before judgment of the right of action, and of the judgment which might be recovered thereon, the record not showing the nature of the cause of action so assigned, it will not be assumed it was an assignable one, for the purpose of imputing error in the rulings and judgment of the trial court.

Judgment: Assignment: Set-off: Notice. An assignee of a judgment takes subject to any matters of set-off existing in favor of the judgment debtor against the assignor, up to such time as such debtor has notice of the assignment.

Submitted on briefs April 15. Decided April 18.

Error to Superior Court of Detroit.

J. A. Fairfield, for plaintiff in error.

D. E. Corbitt, in person, for defendant in error.

MARSTON, J:

Corbitt brought an action against Finn upon a judgment recovered in the Kent circuit court against Finn and in favor of Levi Husband, for the damages he, Husband, had sustained by reason of certain trespass upon the rights and property of said Husband. He also set forth in his declaration that before the rendition of said judgment, the plaintiff therein had sold and assigned "his right of action and claim for recovery of damages against the said defendant for said trespass" and the judgment that was afterwards rendered therein, to the plaintiff in this suit.

The defendant pleaded the general issue and gave notice of set-off.

Upon the trial plaintiff introduced in evidence the rec-

FINN v. CORBITT.

ord of said judgment and also an assignment as set forth in the declaration. The plaintiff also gave evidence showing notice to defendant of the assignment of said judgment, two or three days after the rendition thereof, and rested.

The defendant then introduced evidence tending to show that both before and after the rendition of said judgment he had and held claims against the plaintiff therein which would have been proper matters of set-off against said judgment.

The court instructed the jury in case they should find "that the cause of action was assigned to Mr. Corbitt for value received, before the rendition of the judgment, if you find at the time the judgment was rendered it was the property of Mr. Corbitt, then the court instructs you there was no set off."

The position taken by counsel for defendant in error is, that the action being trespass, no set off was then admissible, and that so soon as the judgment was rendered, it was his, defendant in error's, property, so that "there was never one moment's time that it was the subject matter of set-off while owned by Husband."

This court has heretofore held that torts for taking and converting personal property or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, might be assigned so as to pass an interest to the assignee which could be enforced in a court of law.—*Final v. Backus*, 18 Mich., 231. It was also recognized in the same case as a general rule, that the right of action for a tort is not the subject of assignment. The action brought by Husband against Finn, and which he afterwards assigned to Corbitt, was one of trespass. The record does not show the particulars or nature of the claim out of which his cause of action arose. It does not show that there was anything which could have been the subject of assignment.

Husband also assigned any judgment that he might ob-

FINN v. CORBITT.

tain against Finn, but notice of this assignment was not given to Finn for some days after the judgment was obtained. Until such notice was actually given to Finn, any offset which he then had against the judgment creditor, could be used against the assignee in an action brought upon the judgment.—§ 5796, *Compiled Laws*.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

John Calkins and others v. Thomas Chandler and another.

Contracts: Promise to forbear: Consideration: Indefinite time: Declaration.

An agreement to extend time of payment and forbear to sue a third person who is plaintiff's debtor, is a sufficient consideration for defendant's promise to pay; and no definite time of forbearance being named, a count on an agreement to forbear for a reasonable time is good.

Promise to pay debt of another: Statute of frauds. A promise to make payments on the debt of another, of sums which the promisor should become liable to pay to the debtor for services to be performed by the latter for him, there being a consideration moving to him which was the inducement for making the promise, is not within the statute of frauds, as a promise to pay the debt of another.

Statute of frauds: Promise to pay debt of another: New consideration. While in many cases the test, whether a promise is within the statute of frauds as a promise to pay the debt of another, is, whether the original debtor remains liable on his undertaking and the promise is only collateral thereto, yet where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not.

Forbearance: Statute of frauds: Promise to withhold money for plaintiffs. Plaintiffs having a chattel mortgage upon a saw-mill owned by M, it was verbally agreed between plaintiffs, M and defendants, M being then engaged in sawing lumber for defendants, that in consideration of plaintiffs extending the time of payment of said mortgage, M should allow defendants to retain the sum of fifty cents per thousand feet of all lumber thereafter sawed by M for them, and that defendants should pay the same to plaintiffs:—

Held, The promise was valid and not within the statute of frauds; and defendants were bound to withhold from M the proportion of their

CALKINS v. CHANDLER.

saw-mill they had thus agreed to pay to plaintiffs, and were liable to plaintiffs for the amount thereof, whether they did or not so withhold it.

Submitted on briefs April 12. Decided April 18.

Error to Superior Court of Grand Rapids.

H. E. Dewey and J. A. Fairfield, for plaintiffs in error, cited: *1 Pars. on Cont.*, 368; *4 East*, 462; *1 Penn.*, 382; *3 Penn.*, 282; *5 Rawle*, 68; *11 Mich.*, 219; *17 Mich.*, 355; *4 Am.*, 296.

D. E. Corbitt, for defendants in error, cited: *King v. Upton*, *4 Greenl.*, 387; *Elting v. Vanderbyn*, *4 Johns.*, 237.

COOLEY, CH. J:

The question on this record arises under the statute of frauds. The case made by the plaintiffs below was rested on the testimony of Charles Merritt and Fred E. Remington. Merritt testified that "in the month of May, 1874, he was acting as agent for the plaintiffs, and the plaintiffs had a chattel mortgage against a saw-mill owned by a firm known as Medlar Brothers, and that he called upon said Medlar Brothers for pay. The Medlar Brothers said they were sawing lumber for the defendants, and if the plaintiffs would extend the time of payment on the said mortgage, the said Medlar Brothers would allow the defendants to retain the sum of fifty cents per thousand for each thousand feet of lumber they would saw for the defendants, and the defendants should pay it to the plaintiffs, to which he, the said Merritt, agreed. He and the Medlar Brothers then went to the office of the defendants and Fred E. Remington was present, and there it was agreed between all the parties that the plaintiffs should extend the time for payment of their mortgage during the next sawing season; that the Medlar Brothers should allow the defendants to retain the sum of fifty cents on each thousand feet of lumber that should thereafter be sawed for them by the Medlar Brothers, and the defendants should pay the same to the plaintiffs to apply on the said mortgage which they held against the Medlar

CALKINS v. CHANDLER.

Brothers, and that the plaintiffs did extend the said mortgage through the next sawing season, and that the Medlar Brothers did saw four hundred thousand feet of lumber after the said agreement, for the defendants, and the said defendants did retain the sum of fifty cents on each thousand feet of lumber so sawed, but they did not pay any part of it to the plaintiffs."

Remington, who was one of the defendants, gave testimony tending to prove that he was one of the defendants; that he made an agreement with the Medlar Brothers and the plaintiffs, as stated by the last witness; that the Medlar Brothers sawed lumber for the defendants afterwards, and he charged them upon a book fifty cents on each thousand feet so sawed, while he kept the books.

Three principal objections are taken to the recovery which has been had in this case: *First*, that the agreement proved was void for want of consideration; *second*, that it was void under the statute of frauds because not reduced to writing; and *third*, that conceding the agreement to be valid, defendants could only be responsible under it for such moneys due the Medlar Brothers as they should retain in their hands; and in this case they offered, but were not allowed, to show that they retained nothing. These objections will be considered in their order.

I. The defect in the consideration is supposed to be, that there was no agreement to extend payment for any definite time. In *Rolle's Abridgment*, 27 Pl., 45, it is laid down that "if A be indebted to B in one hundred pounds, and B is about to commence a suit for the recovery thereof, but C, a stranger, comes to him and says that if he will forbear him he himself will pay it, this is a good consideration for the promise; B averring that he had abstained and forebore to sue A, *et ad hunc* did abstain and forbear; though no certain time be appointed for the forbearance; for it seems a perpetual forbearance shall be intended, the which he hath performed. So if he will forbear *paululum temporis*, this is good; plaintiff averring a certain time of

GALKINS v. CHANDLER.

forbearance." In *Payne v. Wilson*, 7 B. & C., 426, the agreement counted upon was to suspend proceedings in consideration that defendant would pay a certain sum on account of the debt on April 1, following; and after verdict for the plaintiff, objection being taken that no consideration appeared, *Tenterden, Ch. J.*, said: "The promise made by the defendant was to pay £30 on the first of April, in consideration of the plaintiff's consenting to suspend proceedings. That imports that the proceedings were at all events to be suspended until that period; and I think that the averment that the plaintiff did suspend the proceedings, is sufficient after verdict; because it must be taken that it was proved at the trial that the plaintiff had suspended the proceedings, either for a time required by law, or for a definite or reasonable time." In *Sidwell v. Evans*, 1 Pen. & Watts, 383, the evidence showed an agreement in consideration of a promise of the creditor to "wait a while and not push" the debtor. The plaintiff had counted on an agreement to forbear to sue for a reasonable time; and the jury having found for the plaintiff on this evidence, the verdict was upheld. In *King v. Upton*, 4 Me., 387, the promise counted on was to pay the debt of another in consideration that the creditor would "forbear and give farther time for the payment of the debt," naming no time. The plaintiff averred that he did thereupon forbear, and the consideration was held sufficient. *Elting v. Vanderlyn*, 4 Johns., 237, is to the same effect. Reference is also made to *Allen v. Pryor*, 3 A. K. Marsh., 305, and *Hakes v. Hotchkiss*, 23 Vt., 231. The averments in the declaration in this case are similar to those in *King v. Upton*, and we think the court was correct in holding them sufficient.

II. The second objection seems to be more relied upon. Our statute of frauds declares that "in the following cases, specified in this section, every agreement, contract or promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith, or by some

CALKINS v. CHANDLER.

person by him thereunto lawfully authorized;" and it enumerates among other cases, "every special promise to answer for the debt, default, or misdoings of another person." It is claimed that the promise counted upon in this suit is of this nature; it being a promise by the defendants to answer for the debt and default of Medlar Brothers to the extent promised.

It is true that the promise of defendants was to make payments on the debt of Medlar Brothers, but it is also true that every payment they promised was to apply on an indebtedness that was to accrue against themselves for the sawing that should be done for them by the Medlar Brothers from time to time. Their promise was consequently a promise to answer for their own debt, and they took upon themselves no new obligation whatever. It has already been determined that the promise was made on a sufficient consideration, namely, the agreement to forbear foreclosure. But while in most cases of similar promises to be found in the books the benefit of the forbearance was expected to accrue to the debtor himself, in this case it is very evident the defendants entered into the arrangement for their own advantage, and that they promised to pay nothing for which they should not receive an equivalent in services performed for them. In other words, there was a consideration moving to them, which was the inducement to their making the promise. In many cases the test whether a promise is or is not within the statute of frauds is to be found in the fact that the original debtor does or does not remain liable on his undertaking; if he is discharged by a new arrangement made on sufficient consideration, with a third party, this third party may be held on his promise though not in writing; but if the original debtor remains liable and the promise of the third party is only collateral to his, it will in strictness be nothing more than a promise to answer for the other's debt. But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or

CALKINS v. CHANDLER.

not. This subject has been so fully considered in the New York courts that a reference to the leading cases of *Farley v. Cleveland*, 4 Cow., 432; *S. C. on Appeal*, 9 Cow., 639, and *Mallory v. Gillett*, 21 N. Y., 412, in which the other cases are collected, will be all we shall make here. In *Nelson v. Beynton*, 3 Met., 396, 402, *Shaw Ch. J.*, on an examination of the authorities says: "The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute." There are many cases in Maine to the same effect, which are collected in *Stewart v. Campbell*, 58 Me., 439. In *Putney v. Farnham*, 27 Wis., 187, 189, *Dixon Ch. J.*, in considering a promise by the defendant to pay to the creditors of one Corlett, debts owing by himself to Corlett, says: "The question is whether such promise was within the statute of frauds, and we believe it to be well settled that it was not, although it was collateral to Corlett's own liability or promise to pay the same debts, and may be said incidentally to have guarantied such payment. It was a guaranty in form, but not in substance or effect, within the meaning of the statute of frauds. It was not a mere promise by the defendant to be responsible for the debts of Corlett to those parties, and to pay those debts, but a promise by him to pay his own debt in that particular way. It was a promise founded upon a new and sufficient consideration moving to the promisor from the debtor at the time the promise was made. Such a promise or agreement is not within the statute of frauds." In further illustration of the same doctrine reference is made to *Brown v. Weber*, 38 N. Y., 187; *Clymer v. De Young*, 54 Penn. St., 118; *Eddy v. Roberts*, 17 Ill., 505; *Wilson v. Bevans*, 58 Ill., 232; *Runde v. Runde*, 59 Ill., 98; *Ford v. Finney*, 35 Geo., 258; *Davis v. Banks*, 45

CALKINS v. CHANDLER.

Geo., 138; *Fullam v. Adams*, 37 *Vt.*, 391, 396; *Andre v. Bodman*, 13 *Md.*, 241, 255; *Britton v. Angier*, 48 *N. H.*, 420; *Johnson v. Knapp*, 36 *Iowa*, 616; *Besshears v. Rowe*, 46 *Mo.*, 501.

The exact point has not hitherto been presented for adjudication in this state. In *Brown v. Hazen*, 11 *Mich.*, 219, a verbal promise by the defendant to pay to the plaintiff a debt owing to him from a third person was held to be within the statute, there being no consideration moving from the plaintiff to the defendant. There is some discussion of the general subject in *Gibbs v. Blanchard*, 15 *Mich.*, 292, but it has no very direct bearing. We think the authorities support the judgment.

III. The question which remains is, whether if the defendants, before suit was brought, had paid over to Medlar Brothers all that was due for the sawing, this would discharge them from their promise to the plaintiffs. If it would, it must be on the ground that they were liable only while they were the debtors of Medlar Brothers, and because of their indebtedness, which in connection with their promise would in effect make them the custodians of a fund set apart for application to the plaintiff's demand. But we think it became their duty under their promise to observe it by withholding from Medlar Brothers the proportion of their bill which they had agreed to pay to the plaintiffs; and that they could not discharge themselves by a disregard of their promise. It is a paradox to say that a promise is valid, but that the promisor may relieve himself from its obligations by violating it.

The judgment must be affirmed, with costs.

The other Justices concurred.

The Kalamazoo Novelty Manufacturing Company v. Norman M. McAlister.

Corporations: Officers: Treasurer: General authority. It is not within the general power and province of the treasurer of a corporation, without special authority, to issue written admissions, which shall bind the company, of the amount due upon a disputed claim for salary of other agents of similar grade.

Corporations: Superintendent: Salary: Admissions. In an action for a balance claimed to be due the plaintiff for services as superintendent of a corporation, a certificate by the treasurer of the company, who was also consulting director, that the company was indebted to plaintiff in a given sum for balance of salary, is not admissible in evidence as an admission binding on the company, in the absence of any showing of authority in such treasurer and consulting director to make such admissions.

Jury: Taking documents to jury-room. It is sometimes proper to allow the jury to take to the jury-room documents which have been admitted in evidence, but it should not be allowed except in cases where the propriety of it is very obvious, and in general not when either party objects.

Taking book to jury-room: Parts not in evidence. The permitting the jury against objection to take with them to their room a book of which only three pages had been introduced in evidence, with no other safeguard against their examining and giving consideration to those parts of the book which had not been made evidence, except a direction to them to look only on a specified page, is held to be error.

Heard April 13. Decided April 18.

Error to Kalamazoo Circuit.

Robert F. Hill, for plaintiff in error, on the point that Kellogg could not bind defendant by the certificate admitted in evidence, cited: *Peek v. Detroit Novelty Works*, 29 Mich., 313; *National Bank v. Norton*, 1 Hill, 579; *Junction R. R. Co. v. Reeve*, 15 Ind., 236; *Ang. & Ames on Corp.*, § 277; *Neale v. Turton*, 4 Bing., 148; and on the point as to permitting the jury to take to the jury-room the book: *1 Green Pr.*, 267; *1 Burr. Prac.*, 235; *Neil v. Abiel*, 24 Wend., 185; *F. & M. Bk. v. Winchfield*, *Ibid.*, 419.

Elbert S. Roos and Arthur Brown, for defendant in error, on the admissibility of the certificate in evidence as an admission, cited: 29 Mich., 313; *Blanchard v. Inhab. of Blackburn*, 102 Mass., 347; *Morse v. Conn. R. R. Co.*, 6 Gray, 450; *Curtis v. Avon Cen. R. R. Co.*, 49 Barb., 148.

GRAVES, J:

The company is a corporation, and McAlister, claiming that it owed him a certain balance for services as superin-

KALAMAZOO NOVELTY MANUF. CO. v. MCALISTER.

tendent, brought this suit to recover it. The alleged employment arose under a resolution of the directors, in these terms: "Resolved that Mr. N. M. McAlister be appointed superintendent of the Kalamazoo Novelty Manufacturing Company for the term of two years, provided he gives satisfaction to the company, at a salary of fifteen hundred dollars per annum."

It appears also, that F. I. Kellogg, who was treasurer, was constituted "consulting director," "with whom the superintendent was to advise." McAlister was allowed to recover six hundred and eighty-seven dollars and fourteen cents, and the company allege error.

To prove that there was a balance due him from the company, and to establish its amount, he was allowed, after some preliminary testimony in regard to the time he was occupied in the company's service, to introduce, against the objection of the company, the following paper:

"\$622.21.

KALAMAZOO, May 29th, 1874.

"This is to certify that the Kalamazoo Novelty Manufacturing Company is indebted to N. M. McAlister, late superintendent of said company, in the sum of six hundred and twenty-two dollars and twenty-one cents for balance of salary.

F. I. KELLOGG,

"Treasurer Kalamazoo Novelty Company."

No account of McAlister had been presented to the company or board of directors. He had asked for a settlement but there had been no audit. He swore he could not fix the amount due him except by this paper. The instrument was introduced and received as an admission of the company of the fact of indebtedness and of the amount.

This we think was error. It could not be entitled to reception in evidence as an admission of the corporation without its being made to appear that Kellogg had authority to make it as an act of the corporation.—*Green's Brice, 425 and note.* There was no direct evidence of such authority. No by-law or resolution conveying the power was shown.

His position as consulting director implied no power to

liquidate and fix the sum which the company should pay McAlister or to state the amount fixed as a fact admitted by the company. Moreover, the paper in question, though made as McAlister insists on much deliberation, was neither drawn or received as performed by Kellogg in character of consulting director. On its face it professes expressly to have emanated from his authority as treasurer. That it was within his power and province in that capacity, cannot be assumed. The document is not a mere transcript or brief from the company's books, and was not adduced as such. It imports that it was ascertained and determined that the company was in fact the debtor of McAlister to the specified amount, and it was put in evidence as an admission of the company to that effect. The general duty of the treasurer of a private corporation is to collect, receive, hold and disburse the funds, and unless specially empowered, his authority could not be supposed to extend so far as to allow him to settle and audit disputed claims brought for salaries by other agents of similar grade, and to issue written admissions of his determination binding on the corporation.

Such duties would regularly fall on the board of directors, and the evidence in the case goes to strengthen the inference that such was the fact here. The resolution relied on by McAlister, tends to show that it was for the board to speak on the part of the company concerning his wages, and not the treasurer, and he testified that it was the board who called on him to quit.

In the progress of the trial the secretary's book of records was produced, and some three pages of its contents were admitted in evidence.

On submitting the case to the jury, the judge allowed them, against the objection of counsel for the corporation, to take with them to their room the book in question, and directed them to look only on page forty-four. The record is not so framed as to enable us to say whether the court was warranted in confining the jury to one of the three pages of the book which were given in evidence, or not.

KALAMAZOO NOVELTY MANUF. CO. v. MCALISTER.

That it is sometimes proper to allow documents in evidence to be taken to their room by the jury, is beyond question; but the practice is one which is exposed to much risk, and it ought not to be allowed except in cases where the propriety of it is very obvious. And in general it should not be indulged when either party objects. Still cases are liable to arise in which justice would require it, and where refusal to consent would be unreasonable, and on such occasions the dissent ought not to prevail. It is hardly safe to attempt a definition of the proper rule by the mention of the exact documents or kinds of documents which should be suffered to go to the jury-room. In the present case the entire book was suffered to be taken, when but three pages were in evidence. The effect was to allow to be taken, and against objection, considerable matter which was not in evidence, and the only security consisted in the direction to the jury to confine their attention to one page. This was error. It can scarcely be claimed that an instruction not to look at unproved matter should be taken as relieving its admission to the jury-room from error. The books speak of effectually sealing up parts of documents when part is submitted to investigation and part is withheld from it. But I am not aware that the practice has been applied to such cases as this, and am not prepared to say it ought to be.

The other questions cease to be of any importance in the case.

The judgment should be reversed, with costs, and a new trial ordered.

The other Justices concurred.

KEAL v. JUDGE OF WAYNE CIRCUIT.

The People on the relation of John Keal v. The Judge
of the Wayne Circuit.

Justice's courts: Joint parties: Appeals. It is competent for one of several plaintiffs or defendants to carry a case heard before a justice of the peace to the circuit court on appeal, and the refusal of his co-parties to unite with him in an appeal cannot preclude him from taking it on his own behalf.

Heard April 17. Decided April 18.

Application for Mandamus.

Ward & Palmer, for relator.

Griffin & Dickinson, for respondent.

PER CURIAM:

The question raised by this application is, whether it is competent for one of several plaintiffs or defendants to carry a case heard before a justice of the peace to the circuit court by appeal, or whether all the plaintiffs or defendants, as the case may be, must unite in the appeal. It is urged that the language, that "any party," etc., may appeal, must be read as meaning that all the litigants, on the one side or the other, may appeal. This is too narrow. The very next section requires the "party appealing" to present to the justice an affidavit made by himself, his agent or attorney, etc., and the expression is here employed manifestly in a sense as extensive as in the first section, and it is quite obvious that it could not have been intended to require all the litigants on the side desiring to appeal to unite in the affidavit. The oath of one is plainly sufficient and has always been so considered.

The statute has always been construed in practice as authorizing an appeal by any litigant "conceiving himself aggrieved," whether others on the same side did or did not "feel aggrieved," or desired or did not desire to appeal, and

KEAL v. JUDGE OF WAYNE CIRCUIT.

a contrary course would, or might, lead to very great injustice. The principle would have to be applied to removals by certiorari as well, and there would be room for the joining of persons as parties for the very purpose of cutting off an appeal or certiorari. However wrong the joinder, the complaining party, if ruled against by the justice, could get no redress. The refusal of the person joined with him for the precise purpose would prevent.

Some inconveniences are possible in case of appeals when all on the appealing side do not unite. But the disadvantages and mischiefs which would be likely to arise from the other construction would greatly overbalance them. The construction which has been heretofore acted on is most consistent and most safe and beneficial, and is well authorized by the terms used.

Writ granted.

The People on the relation of Leonard Covell v. The Treasurer of Kent County.

Jurors' fees: Superior court of Grand Rapids: Kent county. The county of Kent is held to be liable under the statute for the fees of jurors in the superior court of Grand Rapids.

Legislative authority: Jurors' fees. It was competent for the legislature to require the county of Kent to pay the fees of jurors in said court.

Constitutional law: Municipal courts. The legislature had authority under the constitution to establish said superior court. The constitution (Art. VI, § 1) plainly reserves to the legislature the power to carve out of the judicial power vested in the other courts named such authority as it would be proper to confer upon city courts, and to create such courts for its exercise.

Municipal courts: Jurisdiction. It is for the legislature to determine the extent of the authority to be given municipal courts, subject to the restriction that it must not exceed that which can properly pertain to a municipal court. It was not the intention of the constitution that every municipal court should possess both civil and criminal jurisdiction.

Heard April 17. Decided April 18.

Application for Mandamus.

COVELL v. TREASURER OF KENT COUNTY.

W. W. Taylor, for relator, cited: 13 *Mich.*, 233; 5 *Cal.*, 402; 10 *Cal.*, 295; 36 *Cal.*, 691; 18 *Ala.*, 521; 5 *How. (Miss.)*, 20; 7 *Ibid.*, 548; *Dillon Mun. Corp.*, §§ 357-8, and note, and cases cited; 13 *Wis.*, 383; 32 *Wis.*, 510; 3 *Ill.*, 269.

S. H. Ballard, for respondent, cited: *State v. Young*, 3 *Kan.*, 445; *Shafer v. Mumma*, 17 *Md.*, 331; *Dillon Mun. Corp.*, §§ 357-66.

PER CURIAM:

1. The court are of opinion that the statute does make the county of Kent liable for jurors' fees in the superior court of Grand Rapids, and that it is competent to do so.—*People v. Auditors of Wayne County*, 13 *Mich.*, 233.

2. The court also think that under the constitution it was competent to establish the superior court. The constitution, it is true, declares that "the judicial power is vested in one supreme court, in circuit courts, in probate courts and in justices of the peace." But it also in the same section declares that "municipal courts of civil and criminal jurisdiction may be established by the legislature in cities."—*Art. VI.*, § 1. This is a plain reservation to the legislature of the power to carve out of the judicial power vested in the other courts named such authority as it would be proper to confer upon city courts, and to create such courts for its exercise. Where that is done, the legislature must determine the extent of the authority to be given the municipal courts, subject to the restriction that it must not exceed that which can properly pertain to a municipal court. Whether the statute in this instance has overstepped the bounds, is a question not before us. But we do not think it was the intention of the constitution that every municipal court should possess both civil and criminal jurisdiction.

This opinion will probably be conformed to without the issue of any writ of mandamus, and we therefore make no order at this time.

HACKETT v. JUDGE OF WAYNE CIRCUIT.

**The People on the relation of Robert J. Hackett v.
The Judge of the Wayne Circuit.**

Affidavit for capias: Statement of facts and circumstances. An affidavit for *capias* should set forth in detail the facts and circumstances, and not mere conclusions upon information and belief, so that when presented to an officer to fix bail, he can exercise some judgment based upon the facts, and not the conclusions merely of the affiant.

Heard April 17. Decided April 18.

Application for Mandamus.

This is an application to require respondent to vacate an order granted by him, vacating an order of the circuit court commissioner, holding to bail one Hervey S. Dale upon a *capias ad respondendum*, wherein relator was plaintiff. The question raised relates to the sufficiency of the affidavit, which reads as follows:

“Robert J. Hackett, being duly sworn, deposes and says he has, as he has good reason to believe, a just cause of action against Hervey S. Dale for wrongfully converting and disposing of the undivided one-half of the following property, to wit: two oxen and eight horses, of the property of this deponent, of the value of one thousand dollars.

“And this deponent further says that he has, as he has good reason to believe, a good cause of action against said Hervey S. Dale, for the unlawfully drawing from the United States and converting to his own use, twenty thousand dollars upon certain contracts between said Dale and the United States, after the same had been assigned to deponent for a valuable consideration paid by deponent to said Dale, and after he, the said Dale, had given deponent a power of attorney, made by its terms irrevocable, to draw the same, the same being the property of deponent, as the said Dale well knew.”

Atkinson & Atkinson, for relator.

D. C. Holbrook, for respondent.

HACKETT v. JUDGE OF WAYNE CIRCUIT.

MARSTON, J:

Within the principles of previous decisions of this court, we are of opinion that a party should not be deprived of his personal liberty upon an affidavit which merely states conclusions upon information and belief. The facts and circumstances should be set forth in detail, so that when presented to an officer to fix bail, he can exercise some judgment based upon the facts, and not the conclusions of the affiant merely. A creditor may think he has good reason to believe that he has a cause of action against another, when if the facts were fully set forth, it might appear otherwise.—*Const.*, Art. VI., § 26; *Josselyn v. McAllister*, 25 *Mich.*, 45; *Matter of Stephenson*, 32 *Mich.*, 60.

The writ must be denied, with costs.

The other Justices concurred.

The City of Detroit v. The Michigan Paving Company.

Charter of Detroit: Public works: Lowest bidder: Contracts: Quantum meruit. The provisions in the charter of Detroit forbidding the execution of public works except under contract with the lowest bidder, were intended to prevent any action whatever whereby contractors could make private arrangements with the council for payment for work done or to be done in such cases.

Public improvements: Implied contracts: Broken contract: Quantum meruit. The city, being incapable of contracting in regard to public improvements except by express contract, conforming to the charter conditions, and let under supervision, cannot be held upon an implied contract; and work done in paving a street, or the like, without any contract, would not in any case be a charge against the city; and work partially done under a broken contract, which cannot as a written contract be enforced by suit, stands as if there were no contract, so far as any action is concerned.

Municipal corporations: Quantum meruit: Appropriation of private property. There is no difficulty in bringing actions for *quantum meruit* against corporations, any more than against individuals, so far as they are not guarded by charter against them. Where the city has had money or property belonging to others, it may doubtless be compelled to answer

DETROIT V. MICHIGAN PAVING CO.

Contracts: Street paving: Work done under forfeited contract. But the city could not be expected or required to detach from the freehold the work not paid for, even if it could be identified, which would be impossible where it was an undistinguishable proportion of an entire job.

Paving: Materials: Conversion: Assumpsit: Waiving the tort. The material not incorporated in the pavement, and which the city has appropriated, it is liable for as for a wrong, and this liability may be enforced in assumpsit, waiving the tort.

Paving: Special assessment: Charter: Public letting: Lowest bidder: Property appropriated: Contract: Presentation of claim to council for audit. COOLEY, CH. J., *dissenting*, held (1) that the objection that under the contract and under the city charter the city could not be made liable in an action at law, the only remedy of the contractor being through the special assessment, was not well taken; (2) that the first contract having been properly let under the charter, and every thing done by plaintiff having been done under it, and this work and the materials for which this suit is brought having been taken into account in letting the second contract, which was let in due form on that basis, the present claim is not for work done or materials furnished outside the contract, and to permit a recovery for such work and materials as the city has appropriated and had the benefit of, would not infringe the charter provisions for a public letting to the lowest bidder; and (3) that the objection that the claim had not been presented to the council before suit was brought, not having been made by the pleadings, could not be considered.

Heard January 11. Decided April 24.

Error to Superior Court of Detroit.

D. C. Holbrook, for plaintiff in error, argued that the city was not liable on an implied assumpsit created in this manner; that the contract providing expressly that the city should not be liable for any portion of the special assessments until the same should have been paid into the city treasury and that the contractor should depend entirely upon the special assessments, and the charter providing that no such public work should be paid for or contracted to be paid for except out of the proceeds of the tax or assessment levied to pay for the work, and there being no evidence that any such tax or assessment was levied or collected, the city cannot be held liable on the common counts in assumpsit: *Goodrich v. Detroit*, 12 Mich., 279; that the difficulty in the plaintiff's case is, that according to the charter the city cannot become directly liable to pay the money without having taken certain statutory proceedings, and the collection of the money or funds, or the neglect of the city to take such proceedings; and the declaration consisting of the common counts only, cannot apply to either of such cases; that whatever may be the law as to apportionment of contracts between individuals, there can be no such thing here as to the city, a municipal corporation, acting as an agent between property owners and contractors; that

DETROIT v. MICHIGAN PAVING CO.

the charter requires an assessment for the *whole* work before it is commenced, and the contract is, to pay plaintiff for the *whole work when completed*, and not before, and the difficulty here is, that there is no authority to collect or pay any apportionment of the work, and if there is no authority to *collect* it, there can be no *liability* to pay; that the city is a mere agent between the contractor and the public, and can only be liable in an action on the case for neglect to assess the value of the work done; that the property owners are entitled to a faithful performance of the contract: *Dillon on Corp.*, § 648. The city contends that it could not and did not accept this work and materials, and the fact that it was used, makes no difference. The law of the case and the charter prohibit the city from purchasing these materials without going through the form of advertising and receiving bids, and a contractor cannot force it on the city in this way, as the city could not impliedly accept or purchase in this way, when it could not by its own act. A proceeding of this kind prevents the city paying three-fourths of this amount in street paving bonds. The claim was not presented to the council for audit and allowance as required by the charter. All claims being required to be so presented, this is a fact to be shown by plaintiff, and this defense is open under the general issue.

Baker & Thompson, for defendant in error:

There is nothing in the provision of the contract as to forfeiture which would forfeit, as stipulated damages or otherwise, the work, labor and materials that was done or furnished in part performance of the agreement. While it may make time the essence of the contract, it is clear that it does not prevent the paving company from recovering on a *quantum meruit*. It merely compelled the company to stop work on receiving the notice, which would place the company in much the same position it would have been in had it voluntarily abandoned the job.

The city is liable upon a *quantum meruit*. (1) The work performed by the paving company was reasonably worth, not exceeding the contract prices, the sum of one thousand six hundred and thirty-eight dollars and sixty-five cents, and was of that value to the city; (2) The city sustained no damages which would reduce that sum by reason of the company's failure to fully perform the contract; (3) In completing the work the city used the grading, sand and curbstones, furnished by the company.

36 MICH.—43.

DETROIT v. MICHIGAN PAVING CO.

The city's liability on a *quantum meruit* is the same as that of a private person under like circumstances: *Gas Co. v. San Francisco*, 9 Cal., 453; *Detroit v. Redfield*, 19 Mich., 376; *People v. Flagg*, 17 N. Y., 586; *Gas Co. v. Yew York*, 33 N. Y., 309; *Peterson v. Mayor of New York*, 17 N. Y., 449; *DeGrave v. Monmouth*, 19 Eng. C. L., 300; 1 *Dillon on Mun. Corp.*, §§ 383-8.

The original contract with the plaintiff was within the corporate powers, and it was no violation of the charter for the city, in making the contract to complete the work, to use, accept and appropriate the work done and the materials furnished by the plaintiff: *People v. Swift*, 31 Cal., 26; *Keyser v. School district*, 35 N. H., 477; *Hoyt v. Thompson*, 19 N. Y., 207; *Abbott v. Hermon*, 7 Greenl., 96; *Hayden v. Madison*, 7 Id., 76.

It is only where the original contract is absolutely void, and incapable of ratification, that the contractor cannot recover for work actually done and accepted: *Brady v. Mayor of New York*, 20 N. Y., 312; *S. C.*, 2 Bosw., 173.

Under the city charter the cost and expense of street pavements, except crosswalks and of the work at the intersection of cross streets, is assessed upon the abutting property: 2 *S. L.* 1873, p. 1283.

And in the contract in question the city agrees to levy and collect a special assessment upon the property fronting on St. Antoine street, and to pay over the avails thereof to the paving company. A provision was also inserted requiring the company to rely upon such special assessments for payment. But these provisions do not prevent a recovery in this action: (1) The city can collect the amount of the judgment by a further assessment: *City Charter*, p. 77, § 106; 2 *S. L.* 1867, p. 1111; *Whitely v. Lansing*, 27 Mich., 131; (2) This action is necessary to ascertain the amount due and to give the city the benefit of a jury trial: *Mich. Paving Co. v. Common Council of Detroit*, 34 Mich.; (3) There is nothing in the city charter which prevents the payment of the plaintiff or prohibits the common council from making the necessary assessment to collect the requisite amount from the abutters: *City Charter*, p. 122, §§ 206-7; 3 *S. L.* 1869, pp. 1723-5, §§ 38, 40, 42; *Goodrich v. Detroit*, 12 Mich., 279; *Brevoort v. Detroit*, 24 Mich., 322; (4) No execution can issue against the city. The judgment below can only be enforced by compelling the common council to levy a further special assessment.

The provisions of section 25, chap. 4 of the city charter, do not prevent a recovery in this case: (1) It was a special matter of defense, and notice thereof should have been given: 2 *C. L.*, § 5794; it is analagous to a defense under the statute

DETROIT v. MICHIGAN PAVING CO.

of limitations; (2) It is sufficient to present the claim to the council after suit is commenced (if it is then rejected), as the only object of the provision is to save the city the costs of suit.

CAMPBELL, J:

The provisions in the charter of Detroit forbidding the execution of public works, except under contract with the lowest bidder, were intended to prevent any action whatever, whereby contractors could make private arrangements with the council for payment for work done or to be done in such cases. If the letting of a contract is only required as a preliminary form, and if, as soon as it is broken, the council and the contractors may make any arrangement they choose in regard to payment for work done, it is evident that there will be very little safety against such mischief as was meant to be guarded against. No suit can be brought until the council has been given an opportunity to settle without suit, and if there is power to settle at all, the power is plenary. The question is not whether frauds are likely or not. The legislature has seen fit to provide against arrangements not open to competition, by requiring all contracts to be let impartially, and it is for bidders to determine the risks themselves.

There is no difficulty in bringing actions for *quantum meruit* against corporations any more than against individuals, so far as they are not guarded by charter against them. Where the city has had money or property belonging to others, it may doubtless be compelled to answer; but the law has not left this corporation to enter into contracts generally, or without restrictions never imposed on private parties. Individuals are held liable outside the terms of a contract which has been broken, for work done for their benefit, because a contract is implied, and because they are capable of entering upon implied contracts as far as they choose without resorting to express and formal agreements.

But this city has no such power in regard to public im-

DETROIT v. MICHIGAN PAVING CO.

provements. Its contracts must not only be express, but conformed to certain conditions and let under certain supervision. Work done in paving a street, or the like, without any contract, would not in any case be a charge against the city under the law. And work partially done under a broken contract, which cannot as a written contract be enforced by suit, stands as if there were no contract, so far as any action is concerned. Unless the contract itself provides some remedy in such a case, the case seems to be without remedy.

The city has no power to prevent such difficulties, and is not responsible for them. If contractors tear up a street and fail to pave it properly, or to complete their work as they have agreed, they have not put the city in the wrong for not paying them. The corporation would be guilty of misconduct in making express contracts for bad work, or for work intended to be left unfinished. It is impossible to tell what contracts they might have obtained if bids were received on such offers. If liable at all when the work is left undone, the liability arises at once, and without reference to any future contract they may be enabled to make for the completion according to the original plan. There is no possible standard for determining the amount; unless by disregarding the chartered conditions.

The doctrine of implied assumpsit in favor of a defaulting contractor is comparatively modern; and while it is generally equitable, it is in some cases very unjust, as a person is sometimes compelled to put up with such work as he would not have been willing to accept on any terms, because it has some pecuniary value, and cannot well be undone or removed from his land. It is a very easy matter for any contractor to make such terms as will entitle him to installments of compensation as his work progresses, and to make special terms for all accidents and innocent failures. It is a very difficult thing for a public corporation to watch over its contractors and their doings, as a private party would; and for this reason it needs special

DETROIT v. MICHIGAN PAVING CO.

safeguards. The charter is intended to provide these, and it has done so.

The city could not be expected or required to detach from the freehold the work not paid for, even if it could be identified, which would be impossible, inasmuch as it was an undistinguishable proportion of an entire job. The material not incorporated in the pavement, stands on a different footing. It did not belong to the city, and its proceeds, therefore, were not properly receivable or retainable. For these there is a liability arising out of a wrong, and not out of contract; and the form of the remedy in assumpsit, waiving the tort, does not prevent the maintenance of the action based on the facts.

The judgment should be reversed, with costs, and a new trial awarded.

MARSTON and GRAVES, JJ., concurred.

COOLEY, CH. J:

This action is brought to recover the value of labor done and materials made use of in the grading and paving of a portion of St. Antoine street in the city of Detroit. The work was begun by the defendant in error under a contract with the city, bearing date June 23, 1874, by the terms of which the work was to be completed on or before the 15th day of September, 1874. The clause in the contract regarding compensation is as follows: "And it is further mutually agreed that the common council will cause a special assessment to be levied upon all lands or lots fronting or abutting upon said St. Antoine street, lying between Adams avenue and Division street, in consideration of the materials to be furnished and the labor to be performed by said parties of the second part; and it is further agreed by the said party of the first part that party of the first part will pay over to said parties of the second part the avails of all special assessments levied and collected on lands liable by law, which shall be paid

DETROIT v. MICHIGAN PAVING CO.

into the treasury of said city for or on account of such special assessments: *Provided*, That the party of the first part shall have the option to pay to said parties of the second part any portion, not to exceed three-quarters of the contract price of said work and materials, in street paving bonds, in accordance with the charter and ordinances, in lieu of such assessments or moneys to be collected therefrom. But the said city of Detroit, party of the first part, shall not be liable for any part or portion of said special assessments until the same shall have been actually paid into the treasury of the said city."

The bill of exceptions recites that evidence was introduced "showing that the plaintiff proceeded to perform said contract and finished a portion thereof, which was accepted and paid for; that the plaintiff also did certain grading, set curbstones and furnished a quantity of sand, all of which was of the value to the defendant of sixteen hundred thirty-eight and sixty-five one-hundredths dollars, said amount not exceeding the contract prices; that it was impossible for the plaintiff to fully perform said contract by the fifteenth of September, 1874, the time limited therefor, and the same was not performed on that day; that thereupon the board of public works of said defendant, with the direction of the common council, given on the evening of that day, declared said contract forfeited by the plaintiff, the party of the second part thereto.

"That afterwards the common council entered into a contract with another party to complete the work, using the grading, sand and curbstones therein, furnished by the plaintiff; that the defendant did not suffer any damages by reason of the non-performance of said contract by plaintiff, and is not entitled to any deductions for any such damages from the reasonable worth of the labor and materials furnished by the plaintiff as aforesaid.

"It appeared upon the trial of said cause that at the time of the commencement of this suit, the plaintiff had not presented to the common council of the defendant for

DETROIT v. MICHIGAN PAVING CO.

audit or allowance the claim aforesaid, sought to be recovered in this case, as required by section 25 of chapter 4 of the charter of the city of Detroit; that said claim was duly and regularly presented by the plaintiff to the common council on the 29th day of December, 1874, but the common council has ever since neglected and refused to audit and allow the same or to provide for its payment.

"That the above is all the evidence introduced, material to the merits of the case.

"Thereupon the court charged the jury that the plaintiff was entitled to recover said sum of sixteen hundred and thirty-eight dollars and sixty-five cents, and to render their verdict for the same; to which the defendant excepted."

I. The first objection made to this recovery is, that under the contract and under the city charter the city cannot be made liable in an action at law, and that the only remedy of the contractor, if it has any, is through the special assessment. On this point *Goodrich v. Detroit*, 12 Mich., 279, is thought to be an authority. In that case it was decided that the city could not be liable generally for the contract price of an improvement which by the charter was required to be paid only from a special assessment. It was also decided that no action at law would lie on the facts of that case. But the facts were, that the amount of the demand was liquidated, and nothing remained but to enforce payment by means of an assessment. We have repeatedly held that under such circumstances *mandamus* was the proper remedy, and not a suit at law.—*Marathon v. Oregon*, 8 Mich., 372; *Dayton v. Rounds*, 27 Mich., 82; *Peterson v. Manistee*, 36 Mich., 8. But we also held that on the facts of this case *mandamus* was not the appropriate remedy, the amount not being liquidated, and the city having a right to a trial of its liability in the usual mode.—*People v. Common Council of Detroit*, 34 Mich., 201. A suit at law is therefore the only remedy. But this suit does not determine that the city is liable generally; it only fixes the amount, and this amount must be collected in the manner provided by the contract.

DETROIT v. MICHIGAN PAVING CO.

II. It is also insisted that there can be no implied assumpsit where the charter requires all such work to be let on public notice to the lowest bidder. This is probably true as a rule, though there must be some exceptions. There is no complaint here that the first contract was not properly let, and it is conceded that every thing done by the defendant in error was done under it. It is also shown that in letting the contract to a second party, all that had been done by the defendant in error, and its materials on the ground, were taken into account, and a contract let in due form on the basis that the benefit of these were to be had by the contractor. There is consequently no claim here for work done or materials furnished outside the contract. The lettings have been public and in due form, and by means of the second letting the city has turned over to another party that which had been done and furnished for it under the first letting. So far as the materials were concerned, the city strictly had no right to do this against the will of the first contractor, who still owned them, notwithstanding the default; but if the contractor does not object, there is nothing in the action of the city in taking them which is opposed to either the spirit or the letter of the law requiring public lettings. The city has the benefit of the law when it lets the contract publicly, with reference to an existing state of facts and to giving to the new contractor the benefit of that which his predecessor has done and furnished. The value of the work and materials is thus taken into account and covered by the new lettings.

Had the contract not been relet, it is conceded that the city would not be liable for work done of which it did not avail itself. An unfinished work cannot be forced upon the city and payment demanded for it. But where the city immediately proceeds to complete the work, and to appropriate the benefit of all that has been done, there is no justice in resisting a claim to payment.

Natural persons are undoubtedly liable under such circumstances.—*Allen v. McKibbin*, 5 Mich., 449; *Lomax v. Bailey*, 7 Blackf., 599; *Epperly v. Bailey*, 3 Ind., 72;

DETROIT v. MICHIGAN PAVING CO.

Coe v. Smith, 4 Ind., 79; *Fenton v. Clark*, 11 Vt., 557; *Powell v. Howard*, 109 Mass., 192; *Britton v. Turner*, 6 N. H., 481; *Clark v. Manchester*, 51 N. H., 594; *McClay v. Hedge*, 18 Iowa, 66; *Mather v. Butler County*, 28 Iowa, 253; and the same reasons of natural justice apply against municipal corporations with equal force. They are not exempt from an action on a *quantum meruit* in general: *Kinne v. New Haven*, 32 Conn., 210; *Howard v. Oshkosh*, 37 Wis., 242; *Clark v. Manchester*, *supra*; and they ought not to be in any case, unless some positive provision of law or some principle of public policy is violated or disturbed thereby. In the present case nothing of the kind appears.

III. The objection that the claim was not presented to the council before suit was brought, was not made by the pleadings and cannot be considered. The judgment should therefore be affirmed. But the form of the judgment entry should be so modified as to show that the right of the city to make payment according to the terms of the contract is not precluded.

Maggie E. Lyon v. Jerome B. Waldo and others.

Mortgages: Illegal consideration: Settlement of prosecution for adultery: Ratification: Estoppel. Complainant having left her husband on the ground that he was unfaithful to her, with the fixed purpose of remaining away from him permanently and filing a bill for a separate maintenance, made a criminal complaint and procured a warrant to issue against him for adultery; he was arrested, substantially *flagrante delicto*, and thereupon settled the criminal prosecution by giving, among other things, a bond secured by mortgage, conditioned to pay complainant two hundred dollars every six months during her natural life, and in case of default, the round sum of five thousand dollars and all arrears of interest, as a gross amount; complainant then filed her bill for divorce on the ground of adultery, making no claim for any allowance, and obtained a decree, no defense being made; several payments of the semi-annual installments were made, but further payment at length being refused,

 LYON v. WALDO.

the bill in this case was filed to foreclose the mortgage for the gross sum of five thousand dollars and back interest:—

Upon the question whether the mortgage was absolutely void and incapable of being enforced, or voidable only, and so confirmed by the subsequent acts of ratification and payment as to be rendered enforceable, the court was equally divided, GRAVES and CAMPBELL, JJ., holding it void, and COOLEY, CH. J., and MARSTON, J., holding it voidable only, and cured by ratification.

Contracts: Illegal consideration: Confirmation: Part performance. Where a contract is tainted with illegal consideration it is rendered incapable of confirmation by acts of part performance, and whatever is done towards carrying it out is regarded as done under the obligation of honor, and not under the sanction or obligation of law, and what remains stands on the same basis.—Per GRAVES and CAMPBELL, JJ.

Contracts: Illegality: Defense: Public policy. The defense of illegality is a peculiar one, and in its nature differs from most others; the objection is rather that of the public, speaking through the court, than of the defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy.—Per GRAVES and CAMPBELL, JJ.

Adultery: Initiation of prosecution: Injured spouse: Settlement: Statute construed. The legislative enactment confining the initiation of a criminal prosecution for adultery to the injured spouse, does not operate to take private compromises between the accuser and the accused of such prosecutions out of the general rule. The statute (*Comp. L., 1871, §§ 7870-2*) making provision for the settlement of certain minor prosecutions, requires the settlement to have the sanction of the court, and no express provision is made for the settlement of prosecutions for adultery.—Per GRAVES and CAMPBELL, JJ., COOLEY, CH. J., concurring.

Adultery: Prosecution: Injured husband or wife: Statute construed. The reason for limiting to the injured spouse the right to move the criminal law in such cases, finds its proper bounds in considerations of family peace and the good of society, and it is incapable of being so far extended as to imply a right to resort to public prosecution to compel a division of property. The construction contended for, instead of favoring family peace and forgiveness and forbearance, would tend to encourage persecutions and plots and schemes unfriendly to domestic concord.—Per GRAVES and CAMPBELL, JJ.

Husband and wife: Separate maintenance: Arrest for adultery: Settlement. The complainant being justifiable at the time she caused the arrest of her husband in refusing to live with him longer and in demanding a reasonable separate maintenance, she might negotiate with the defendant respecting it, and unless fraud or duress was employed, the courts ought not to disturb their arrangements so far as respected the property.—Per COOLEY, CH. J., MARSTON, J., concurring.

Duress: Securities: Fraud: Laches: Ratification. Duress is a good defense, if it is made in good faith and seasonably; but the misuse of legal process to obtain securities is to be regarded as a species of fraud; and where a party relies upon it in equity as a ground for avoiding his security, he is bound as in other cases of fraud to move promptly, and must not sleep on his rights; and if he goes on and by his conduct assumes the contract to be in force until the position of the other party to it has

LYON v. WALDO.

changed, he ought to be held to have affirmed it.—Per COOLEY, CH. J., MARSTON, J., concurring.

Voidable securities: Ratification: Estoppel: Fraud. The defendant in this case having for two years recognized the securities as valid, and made payments upon them, and complainant, relying upon the arrangement already made, having procured her divorce without asking for or obtaining any alimony, his course in allowing her to suppose he intended to recognize the validity of the securities, and in repudiating them only after in reliance upon this supposition she had lost other rights, works such a fraud upon her as deprives him of any consideration in equity.—Per COOLEY, CH. J., MARSTON, J., concurring.

Adultery: Criminal prosecution: Settlement: Statute construed. MARSTON, J., holds that under our statute, adultery, although a felony, is an exception to the general rule, in that the injured husband or wife only has power to commence the prosecution, and that this gives the person aggrieved a control over the prosecution which is not given in any other class of felonies.

Heard January 11. Decided April 24.

Appeal in Chancery from Ingham Circuit.

D. & W. Johnson and H. B. Carpenter, for complainant, as to the claim that the bond and mortgage were void because executed under duress, argued that it clearly appears from the evidence that defendant was under a legal arrest, and was guilty of the crime charged in the complaint, and that legal imprisonment by order of law is not duress by imprisonment: *Bowyer Law Dic.*, 513; *1 Pars. on Cont.*, 319; *Rood v. Winslow*, 2 Doug., 68; *Peck v. McAlpine*, 3 Catnes, 166; *Watkins v. Baird*, 6 Mass., 506; *2 Kent Com.*, 452; *Matter of William Wells*, 18 How., 307; *Walbridge v. Arnold*, 21 Conn., 424.

A deed executed under duress is not void, but only voidable, and it may be ratified and affirmed by the party upon whom the duress was practiced: *Herman on Estoppel*, 244; *1 Parsons on Cont.*, 322; *Bacon Ab.*, Duress "C."

We concede that securities given to compromise a felony, where the public alone are interested in the prosecution, could not be enforced by process of law; but the legislature, in limiting the right of prosecution to the injured party, have clearly indicated that they regarded injuries of this kind more of a private than a public wrong.—See *Briggs v. Withey*, 24 Mich., 136.

We submit that it would be against public policy to deprive the injured party of the right to settle cases of this kind, provided no undue advantage is taken against the wrong-doer. And the facts in this case do not show any oppression or any undue influence used by the complainant or her agents. Ample

LYON v. WALDO.

time was given for reflection and for the procurement of counsel. The husband had been living in adultery. It was open and notorious. The amount secured for the support of the complainant was not unreasonable, in view of the pecuniary circumstances of the defendant, and we add that this settlement was made with the consent of the prosecuting attorney. There can be no pretense that the prosecuting attorney was influenced by any pecuniary or improper considerations.

We think it is clearly inferable from the testimony in the case that the complainant, at the time of this settlement, had made up her mind to separate permanently from her husband, and when that separation was pronounced by the court in the decree for a divorce, in consideration of the amount received in this settlement, no alimony was asked for.

J. C. Shields and M. V. Montgomery, for defendants.

The bond and mortgage were obtained by duress and coercion practiced upon defendant. When a person makes a contract under duress or terror the courts will not enforce it: *1 Story Eq.*, § 239. Some authorities hold that if there is the slightest ground to suspect imposition, the contract will be set aside: *Wilkinson v. Stafford*, 1 Ves. Jr., 43; *1 Story Eq.*, § 239. The duress may consist of either imprisonment or threats of imprisonment: *Taylor v. Jaques*, 106 Mass., 291. If a person is arrested under a legal warrant and by a proper officer, yet if the object is to extort money or enforce the settlement of a civil claim, it is a false imprisonment by all who have directly or indirectly procured the same, and any conveyance made under the influence of such imprisonment is void: *Hackett v. King*, 6 Allen, 58; *Richards v. Vanderpool*, 1 Daly, 71; *Brooks v. Berrifield*, 20 Ind., 97; *Bush v. Brown*, 49 Ind., 573; *Seiber v. Price*, 26 Mich., 518; *Gallaway v. Burr*, 32 Mich., 332.

The securities are void because given in view of and for the purpose of compounding and compromising a felony. No action can be maintained to enforce performance of any contract the consideration of which, in whole or in part, was the compounding of a crime or the stifling of a criminal prosecution: *Comp. L.*, § 7672; *Bigelow v. Woodward*, 15 Gray, 580; *Clark v. Pomeroy*, 4 Allen, 534; *Taylor v. Jaques*, 106 Mass., 291; *Fellows v. Van Heyring*, 23 How. Pr., 230; *Bettinger v. Bridenbecker*, 63 Barb., 295; *Conderman v. Hicks*, 3 Lans., 108; *Loomis v. Cline*, 3 Barb., 453; *Fay v. Oatley*, 6 Wis., 45; *Snyder v. Willey*, 24 Mich., 136; 33 Mich., 483, 495; 16 Mass., 91; 18 Pick., 440; 5 Vt., 42; 9 Vt., 23; 5 N. H., 563; 2 South, N. J., 578; 13 Wend., 592; 6 Dana, 338; 11 Vt., 252.

LYON v. WALDO.

That the purpose of this prosecution was to compel the giving of this mortgage, and that the whole or a substantial part of its consideration was the adjustment of this charge, is hardly attempted to be concealed or disputed.

If so, it is idle to talk about the security being *voidable* and liable to be made obligatory by subsequent ratification. In the first place, it was *absolutely void*.

An *illegal, unlawful* consideration cannot be rendered a legal and lawful one by subsequent ratification.

If A murder a man at the instigation of B, for which B gives him his note for \$1000, can it be said that because B has paid the annual interest on his note for two or three years that it thereby becomes a valid instrument?

This question is not one of how much defendant ought to have paid the complainant.

The question is, was any portion of the consideration for which this mortgage was given the "compounding or concealment of a felony." If so, the security is absolutely void, and cannot be galvanized into life by subsequent acquiescence.

If A owe B \$1000 cash, and A declines to secure it, and while matters are thus situated B discovers that A has committed murder; he thereupon goes to A and proposes to conceal the crime and cancel the debt for a mortgage of \$2000, which A gives; such instrument is void and incapable of ratification, and *no part* of it can be enforced.

GRAVES, J:

For some years before August 26, 1871, and thereafter until June 27, 1872, complainant was the wife of the defendant Jerome B. Waldo, and as husband and wife they lived together at Williamston, in Ingham county, up to the date first mentioned. At or just previous to that time she became satisfied that he was guilty of criminal intercourse with a woman living a few rods distant, and she hence withdrew from him at that date with the fixed purpose of not living or cohabiting with him longer, and which purpose she has kept; and with the further purpose of obtaining, as the bill states, a separate maintenance.

Desiring legal advice and assistance, she came to this city and consulted with and employed Mr. Wiley, a lawyer then in practice here. She seems to have placed her inter-

LYON v. WALDO.

ests entirely in his hands, and to have empowered him, so far as she was capable, to take such steps as he in his discretion might deem best, and she seems to have fully acquiesced in his doings as they occurred, and to have sanctioned the whole as though done by herself in person. Under his direction, and on her complaint therefor, a warrant was issued by a magistrate against Waldo, then her husband, for the crime of adultery, and given to an officer for service. This was on Saturday, the 26th of August, and the officer, following Wiley's directions, deferred service until the next day, Sunday, in the evening, when, and about half-past ten, Waldo was arrested at the house of the woman before mentioned, under circumstances nearly or quite conclusive that he was then at least criminal. On the succeeding Tuesday, being the 29th of August, he appeared before the magistrate under arrest upon the warrant. The prosecuting attorney having consented that Wiley, who had made a request therefor, should have control of the prosecution, the examination was by consent adjourned until the 4th of September, at four o'clock in the afternoon. On the forenoon of Monday, the 28th of August, and being the day succeeding the arrest, negotiations were begun between Wiley and Waldo on the basis of a pecuniary benefit from Waldo to complainant on the one hand, and a stoppage of the prosecution on the other; and during the interval between the amicable adjournment of the examination on the 29th of August and the 4th of September, to which the adjournment extended, the negotiations terminated in an agreement. Waldo paid Wiley one hundred dollars in cash, gave his note for four hundred dollars more, which he paid subsequently, and paid as costs of the criminal proceedings twenty-six dollars and forty cents. He also gave Wiley, in trust for complainant, his bond, conditioned for the payment for her benefit of two hundred dollars every six months during her natural life, and with a stipulation to pay the round sum of five thousand dollars and all arrears of interest, as a fixed gross amount in case of default on any half-yearly payment, and

LYON v. WALDO.

to secure performance of this bond Waldo, together with his brother James and wife, gave a mortgage on real estate. On the other hand, the criminal prosecution was stopped by Wiley's direction, and was not resumed. Neither was any other instituted, and the offense was treated as a matter settled and barred.

During the entire transaction Wiley was allowed to guide, control and use the prosecution in the name of the people, without interference, to obtain the money and securities before mentioned, and they were given and taken as satisfaction for the offense imputed, the costs and charges of the magistrate and arresting officer, the individual charge made by Wiley, and to secure the stifling of the pending criminal prosecution.

Within two or three days, and on the fifth of September, complainant filed her bill against Waldo for a divorce from the bonds of matrimony, and the specific charge in the bill was an act of adultery alleged to have been committed on the evening of the arrest, and which was considered provable by the arresting officer and a person who attended him. No claim for any allowance was preferred, and no allowance was made.

Waldo offered no defense, and on June 27th, 1872, divorce was granted. A few days later, and in the next month, he married the woman implicated in the previous charges against him, and a little more than two years thereafter complainant married her present husband, Mr. Lyon.

Waldo proceeded to make the stipulated half-yearly payments, and continued doing so up to the payment due August 29, 1874, but after paying that, he refused paying further.

Wiley died intestate in April, 1874, and complainant filed the present bill in her own name to foreclose the mortgage and claimed the gross sum of five thousand dollars and back interest.

The defendant, her former husband, answered and urged several grounds of defense, the most material being that

LYON v. WALDO.

the mortgage was contaminated by unlawful consideration and hence was not enforceable.

After examination the circuit judge became convinced that the recourse to the criminal law on the part of complainant was not in good faith; that the prosecution was moved and used for the purpose of private gain and advantage and not to vindicate public justice, and that in fact the giving of the mortgage was brought about directly by the influence of the proceeding, and that the giving up of the prosecution was matter of consideration; but he came to the conclusion after all, that the security was not made thereby utterly uncollectible, but only voidable, and that Waldo's subsequent acts of payment confirmed it and rendered it enforceable; and acting in this view he allowed a decree of foreclosure, and Waldo appealed.

Now there is no room for controversy about the facts. There is no evidence to show that the securities were given or received as a provision for complainant's maintenance as a married woman apart from her husband. On the contrary, the proof is strong that the arrangement contemplated a speedy dissolution of the marriage at complainant's instance. And again, there is no evidence to show that the existence of the securities had any influence upon the matter of alimony or allowance in complainant's suit for divorce. That the criminal proceeding was made use of solely to drive the accused to make over or secure to the accuser and her agent something like an estimated one-third of his property, and that the mortgage originated in the execution of this plan and as part of its fruit, and that a portion at least of its consideration was the suppression of the prosecution, are facts substantially admitted, and in such a state of facts I cannot concur with the circuit judge. It is of no consequence whether what was obtained did or did not exceed the claims of moral justice. The question concerns the means employed to get what was obtained. The law wisely and sternly disallows the use of measures which dishonor it and falsify its processes and pervert the duty of its

LYON v. WALDO.

ministers to reach ends which in the abstract may be excellent, and the nature of the thing and the principle on which the court acts in entertaining such objections in cases to enforce contracts are inconsistent with the notion that acts of part performance can obviate the difficulty or reverse the duty of the court.

Where a contract is tainted with illegal consideration it is rendered incapable of confirmation by acts of part performance. Whatever is done towards carrying it out is regarded as done under the obligation of honor, and not under the sanction or obligation of law, and what remains stands on the same basis. The performance of it may be required by the sentiment of honor, but the law does not attach and bind the party to complete the unlawful compact. The principle is recognized in *Snyder v. Willey*, 33 Mich., 483, and in other cases too numerous for citation. *Cole v. Gibson*, 1 Ves. Sr., 503, is one among the earlier authorities.

The defense of illegality is a peculiar one and in its nature differs from most others. The objection is "rather that of the public, speaking through the court, than of the defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy."—*Fry on Sp. Per.*, ch. 9, § 309. However dishonorable, however culpable the defendant may be, the result is the same, and however numerous may have been the acts of part execution, they cannot cleanse the contract of the impurity of its origin and cause it to be the duty of a court of justice to respect and enforce it.

The learned counsel for complainant makes no question concerning the general rule. He argues, however, that the case is not within it; that in confining the initiation of a criminal prosecution to the injured spouse, the legislature clearly indicated their opinion that the offense of adultery partakes more of the character of a private than of a public

LYON v. WALDO.

wrong, and is not properly subject to the same regulations or the same consideration as other offenses, and that public policy requires that private compromises of such prosecutions should be permitted to the accuser and accused in case there is no oppression or moral unfairness, and that testing the present transaction by this rule, the objection to the enforceability of the mortgage is not sustained. We cannot yield to this argument. It contains assumptions and implications which are hardly warranted. The legislature must be taken to have been cognizant of the reasonable and long well settled doctrine in law and equity on this subject; and had it been designed to exclude its application in cases of this sort it is reasonable to suppose the will to do so would have been distinctly made known. This has not been done. So far from it, the actual facts and incidents imply the contrary. The mind of the legislature was particularly turned to the subject of authorizing private adjustments of matters criminally prosecuted, and they made specific provision for the settlement in that way of some kinds of public prosecutions, but not for public prosecutions for adultery. And their sense of the mischief which might arise from an unrestrained power to settle, even in the class of cases contemplated, is plainly shown by the conditions imposed. The settlement is required to have the express sanction of the court.—§§ 7870, 7872, *C. L.*; *Com. v. Dowdican's Bail*, 115 *Mass.*, 133.

The implication is certainly somewhat strong against any purpose to tolerate private settlements of public prosecutions for adultery; at any rate to the extent of making their suppression by such means a valid consideration for securities made by the accused to the accuser.

When the legislature included adultery among felonies, they were naturally observant of the offense in its domestic as well as other aspects, and were led to take pains to confine the right to put the criminal law in motion to the injured spouse. The final purpose was the good of society, and as that must be closely connected with the peace of

LYON v. WALDO.

families, it was considered that the latter ought not to be left at the mercy of outside informers, or that the injured party should be restrained or precluded from forbearing complaint. If the innocent spouse preferred to live on without calling forth the energy of penal law and making public family infelicities and impurities, and perhaps visiting innocent children and other relatives with affliction if not disgrace, it was deemed expedient and most for the general good that the public should not be allowed to intervene.

The reason for limiting to the injured spouse the right to move the criminal law would seem to find its bounds in considerations of this sort, and we think it incapable of being so far extended as to imply a right to resort to public prosecution to compel a division of property. When the innocent party has resolved to forbear no further, and has actually set the law in motion and the case is launched, the reason and policy of the provision limiting the right of complaint would seem to be satisfied, and the public right would appear to have attached. The construction contended for, instead of favoring family peace and forgiveness and forbearance, would tend to encourage persecutions and plots and schemes unfriendly to domestic concord. A new and unworthy inducement to prosecute would be held out, and that its influence in families and communities would in many ways be extremely pernicious, seems too plain to admit of controversy.

In what has been said concerning the invalidity of securities made to stifle a prosecution for adultery, there has been no purpose to imply any opinion touching any penal liability of the party who prosecutes and assumes to compromise. No question of that sort is considered as involved.

Finally, in view of the facts disclosed, I see no ground on which the mortgage can be regarded as an enforceable security, and it follows, therefore, that the decree below should be reversed, and the bill dismissed.

CAMPBELL, J., concurred.

LYON v. WALDO.

COOLEY, CH. J:

I should agree with Mr. Justice Graves that there could be no reasonable doubt that the mortgage in suit was obtained by means of the prosecution for adultery, but it does not necessarily follow that the prosecution was instituted for that purpose. The guilt of the defendant appears to have been unquestionable, and the criminal proceedings were certainly not colorable, and they were not conducted in a manner specially oppressive. The arrest, it is true, was made at an unusual hour, but the time seems to have been selected with a view to detecting the defendant *flagrante delicto*, and if not excusable, the choice of time was certainly not very censurable.

The point in which I disagree with the opinion just read is, in holding the security wholly void; and upon that I shall state my views very briefly. The complainant when she caused her husband to be arrested was fairly justifiable in refusing to live with him longer, and in demanding a reasonable separate maintenance. Had she filed her bill for divorce and maintenance, the court would unquestionably have awarded both. Having this legal right, she might negotiate with the defendant respecting it, and unless fraud or duress was employed, the courts would not disturb their arrangements so far as respected the property. So much is unquestionable.

The husband entered into such negotiations, which resulted in the giving of the securities in suit, but he claims that these were extorted from him by duress. Duress is a good defense, if it is made in good faith and seasonably; but the misuse of legal process to obtain securities is to be regarded as a species of fraud.—*Seiber v. Price*, 26 Mich., 518; *Galloway v. Burr*, 32 Mich., 332. And where a party relies upon it in equity as a ground for avoiding his security, he ought, as in other cases of frauds, to move promptly, and not sleep upon his rights. If he goes on and by his conduct assumes the contract to be in force

LYON v. WALDO.

until the position of the other party in respect to it has changed, he ought to be held to have affirmed it.—*De Armand v. Phillips*, *Wal. Ch.*, 186.

Let us see, then, what was done by the parties respectively in this case after the securities were given. For two years, at least, the husband recognized the securities as valid, for he made two annual payments upon them. Meantime the complainant had proceeded to obtain a divorce from him. Relying upon the arrangement already made, she asked for and obtained no alimony. This was a very important change in her circumstances as regards her right to a maintenance from the husband, and if the husband allowed her to suppose he intended to recognize the validity of the securities, and only repudiated them after, in reliance upon this supposition, she had lost other rights, this was such a fraud upon her as deprives him of any consideration in equity. And it is a significant fact that we only hear of the repudiation of the securities after Mr. Wiley, who acted as trustee in taking them and who was cognizant of all the facts, has passed away, so that complainant cannot have the benefit his explanations.—See *Campau v. Shaw*, 15 *Mich.*, 226.

I am therefore of opinion, on the facts shown, that defendant is not entitled to relief. I base my conclusion upon the delay, and the change in the condition and circumstances of the parties induced by or accompanying the acquiescence in the securities.

I cannot agree with complainant's counsel that the injured wife is entitled of right to settle criminal prosecutions for the adultery of the husband. The power to do so would be susceptible of innumerable and enormous abuses, and would prove intolerable. But for the reason stated, I think the decree should be affirmed.

MARSTON, J:

I concur in the opinion of the Chief Justice in this case for the reasons therein stated, and the additional reason

LYON v. WALDO.

that under our statute, adultery, although a felony, is an exception to the general rule, in that the injured husband or wife only has power to commence a prosecution for such an offense. This gives the person aggrieved a control over the prosecution which is not given in any other class of felonies. This distinction was clearly recognized and acted upon in *Briggs v. Withey*, 24 Mich., 136.

The court being equally divided as to whether the decree below should be affirmed or reversed, the same is affirmed under the statute.

The Au Sable River Boom Company v. William Sanborn and others.

Payment: Debtor's acceptances: Agreement. The taking of the debtor's acceptances does not operate as payment of the debt in the absence of an agreement that they should be received in payment.

Boom companies: Lien on logs: Delivery: Acceptances: Lien on residue of logs: Waiver. A boom company having taken time acceptances for its claim for services upon rafts of logs delivered to the owners thereof, this would give the latter the right to demand and receive the residue of their logs released from any lien for services upon the rafts delivered. There being no agreement or understanding that the logs on hand might be retained as security for the future payment of a demand not then payable, such an agreement cannot rest in implication. And the lien being thus once lost could not be revived by the maturing of the acceptances; a lien once waived is permanently lost.

Lien on logs retained for dues on logs delivered: Bona fide purchaser: Waiver. Even if as between the boom company and the original log owners there could be any question that the taking of such acceptances would be a waiver of any lien therefor on the remaining logs, there could be none as between the company and a third person to whom the property has been sold without notice of any claim for services in respect to logs previously delivered. If one by his purchase acquires an immediate right to remove his property, he cannot lose it by any subsequent default of his vendor.

Submitted on briefs April 10. Decided April 24.

Error to Iosco Circuit.

Walker & Kent, for plaintiff in error.

There can be no doubt that the plaintiff had originally a lien upon these logs which was not lost by the surrender of a portion of them: *Comp. L. 1871, § 2788*. The statute provides that the right to retain possession shall continue until the charges "shall be determined, satisfied and paid."

This lien was not affected by the order of Sanborn & Brother to deliver those logs to Howard & Son in pursuance of the sale. No demand for the delivery of the logs was made when the order was presented, and it was at a time of the year when such delivery would have been impracticable. A sale of logs on which plaintiff had a lien must have been subject to this lien. It must have been subject to any lien the plaintiffs had when they received notice of the sale.

The taking of negotiable paper for the amount of charges was not a waiver of the lien. It is settled in this state that the taking of such paper is not payment unless it is so agreed by the parties. It may be contended that the taking of these notes was a waiver of the lien, because time was given; but the language of the statute is express. The right to keep possession continues until the debt is "satisfied and paid." It is important to notice that the lien in this case is statutory, and must depend upon the words of the statute for its extent. Unless the giving of time is payment, the lien is not lost by giving time.

The discounting of one of the notes was not a waiver of the lien as to this note. The plaintiff, by its indorsement, remained liable on the note. The case does not expressly show that this note had been taken up by plaintiff, but both notes were produced by plaintiff on the trial. At any rate, it appears that neither note has been paid, in whole or in part, and hence the lien has not been discharged or waived as to either note.

The fair inference from the facts found is, that neither party had any thought that the lien of plaintiff on the logs undelivered was in any way lost. These logs did not come down, and in all probability were not expected to come down until the winter season began, and prevented the possibility of their being delivered until long after both notes became due. There was, therefore, no reason why Sanborn & Bro. should have asked for a release of the lien if they expected to pay their notes; and probably one great reason why the company released a part of the logs was that they thought they had an abundance of security in the logs still retained.

There are a great many authorities upon the subject of

AU SABLE RIVER BOOM CO. v. SANBORN.

liens and their waiver, both at common law and under statutes. They are partly collected in 2 *Parsons on Notes & Bills*, 175 *et seq.*, and 164 *et seq.* The conflict in the decisions is considerable. It does not seem to us that a discussion of these cases will throw much light on a question like that under consideration, which must be determined by the interpretation of the language of a special statute.

Brown & Farrand, for defendants in error.

The facts agreed upon furnish no ground whatever for a recovery for any services rendered upon or about the logs seized. If, therefore, the plaintiff had any right to retain them it was to enable it to secure payment of the two acceptances which it received from William Sanborn & Brother.

In *Danforth v. Pratt*, 42 Me., 50, it was held a lien may be waived or lost by voluntarily parting with the possession of the goods. So in the case of *King v. Indian Orchard Canal Co.*, 11 Cush., 231.

In *Hutchins v. Olcott*, 4 Vt., 549, it was held that when labor is bestowed on articles under an agreement to receive a note in payment, the lien on them is waived; and when there was no such antecedent agreement the subsequent taking of a negotiable note waives the lien. It is true that it has been held that the mere taking of a note without releasing possession of the property is not necessarily a waiver, but that the taking of a note and releasing possession does operate as a waiver.

Where the possession of the property is surrendered, this shows an intention to extinguish the lien: *Lewis v. Clarke*, 18 Miss., 120; *Bulls v. Cuthbertson*, 6 Ga., 166; *Muir v. Cross*, 10 B. Mon., 277; *Succession of Kercheval*, 14 La. Ann., 457; *Clark v. Draper*, 19 N. H., 419.

We are aware that it has been held that the delivery of a portion of the goods held by a warehouseman, when no note is taken therefor, does not operate to prevent such warehouseman from asserting a lien upon that portion of the goods retained by him to satisfy his charges on the whole.

This seems to be the farthest that any case goes toward modifying the rule as laid down by *Paley* and *Chitty*, "that a particular lien is the right to retain a thing for some charge growing out of that identical thing." In *6 East*, 622, *Chief Justice Kenyon* held that the master and owner of a ship in which a quantity of tar was imported, had, after delivering one-half of it, a lien upon the remainder for the freight of the whole, yet he doubted whether this would not be otherwise if the tar had been sold to different persons by the shipper

AU SABLE RIVER BOOM CO. v. SANBORN.

In *The Boltvar*, *Olcott Adm.*, 474, it was held that a lien will not be upheld in prejudice of an innocent purchaser in favor of a party who seeks to enforce it inequitably. In *Loring v. Flora*, 24 Ark., 15, it is held, with reference to statutory liens, that if before the lien becomes duly fixed as prescribed by law, another person obtains title to the property, the lien is thereby defeated as to that particular property. Howard & Son were innocent purchasers, and had no reason to believe that any lien would be asserted upon the logs in question except for services performed upon the same. At the time of the purchase nothing was due the plaintiff from Sanborns.

In *Rose v. Gray*, 40 Ga., 156, it was held that a lien was not good as against a purchaser without notice. In this case there was not even constructive notice to the Howards of any claim whatever on the part of the plaintiff, and even as to the logs in question, no part of them was in the plaintiff's booms at the time Howard & Son purchased them. And though they were within the so called boom limits, it does not appear that the plaintiff had performed any labor upon them whatever. Again, the acceptances operated to transfer the promise of the drawees or acceptors from the drawer to the payee. It is not pretended but that the party discounting the acceptance has a right of action against Sanborn & Bro. Nor can the fact that the plaintiff may, under our statute, be joined as a defendant with Sanborn & Bro., in an action by the payee upon the acceptances, make any difference. Before the plaintiff can have a right of action upon these acceptances, Sanborn & Bro. must in some way be discharged from any liability to the payees.

COOLEY, CH. J:

This case comes before us upon a finding of facts, of which the following are the material portions:

"During the years 1874 and 1875 William Sanborn and James M. Sanborn were engaged in lumbering business, as partners, under the firm name of Wm. Sanborn & Brother.

"During the years of 1874 and 1875 the plaintiff rafted a quantity of pine logs and timber for said Sanborn & Bro., delivering different rafts to different tugs for them.

"On the 21st day of August, 1875, the plaintiff left in tow of the tug Wilcox, for said Sanborns, a raft which the plaintiff had rafted for them, and received their acceptance

AU SABLE RIVER BOOM CO. v. SANBORN.

therefor, payable in sixty days, which, with interest included therein for sixty-three days, amounted to eight hundred and forty dollars and forty-seven cents, which the plaintiff procured to be discounted on endorsing the same.

"On the 5th day of October, 1875, the plaintiff left in tow of the tug Livingstone, for said Sanborns, a raft of logs which the plaintiff had rafted for them, and received their acceptance for such rafting for the sum of eleven hundred and ninety-six dollars and ninety-two cents, due in ninety days, which acceptance included interest for ninety-three days at ten per cent. These logs were rafted at the request of Sanborn Brothers.

"January 6th plaintiff received an order from Sanborn Brothers, dated September 20, 1875, directing the plaintiff to deliver all of their, Sanborn's, logs and timber in the Au Sable river to Howard & Son, meaning John Howard and Henry Howard.

"During the seasons of 1874 and 1875 the plaintiff received within their boom limits in the Au Sable river, six hundred thousand feet of pine logs, being the same logs described in the petition filed at the commencement of proceedings, and a portion of the same lot of logs from which the rafts were made and acceptances given. These logs were transferred from the boom limits, so called, into the booms of the plaintiff, or most of them, between the first of October, 1875, and the first of December, 1875. The boom limits referred to embrace all of the Au Sable river above the plaintiff's boom for a distance of thirty miles, and in which the plaintiff receives logs and runs them to their booms. Said logs were purchased by Howard & Son, September 20, 1875.

"No part of the two acceptances hereinbefore mentioned and described, or either of them, has been paid, and there is now due thereon, exclusive of interest, the sum of two thousand and thirty-seven dollars and thirty-nine cents, as set forth in the plaintiff's petition.

"No demand has been made upon Howard & Son, nor

AU SABLE RIVER BOOM CO. v. SANBORN.

upon any other person or persons, for any charges, either for running, sorting, booming, rafting, care and storage of said six hundred thousand feet of logs and timber, or any part or portion thereof.

“The usual custom of the plaintiff is to require payment for the running, sorting, booming, rafting, care and storage of logs and timber, on delivery of the same to the owner, but in consenting to take the acceptances of Sanborn & Brother as aforesaid, the same was at their special request, and as an accommodation to them.

“Immediately upon receipt of an order from Messrs. Sanborn & Brother to deliver the logs and timber to Messrs. Howard & Son, they were notified (between the 10th and the 15th of January, 1876), by letter, that plaintiff held the said logs and timber for an account due from Messrs. Sanborn & Brother of two thousand and thirty-seven dollars and thirty-nine cents, and claimed a lien thereon for the satisfaction of the same, but no legal proceedings were taken in the matter until the filing of the petition in this cause.”

Upon these facts the circuit judge gave judgment against the lien. In this we think there was no error.

The taking of the acceptances, according to the well settled doctrine in this state, was not payment of the demand in the absence of evidence of an agreement that they should be received in payment.—*Gardner v. Gorham*, 1 Doug. Mich., 507; *Hotchin v. Secor*, 8 Mich., 494. There is no evidence of such an agreement here. It does appear, however, that the acceptances taken were payable at a future day, and we understand from the finding that they covered the whole amount then due. As no agreement to the contrary is shown, the owners of the logs must have had the right to demand and receive them at any time, subject to the payment only of any sum then due; for we cannot imply an understanding that the logs on hand should be retained as security for the payment at a future time of a sum not presently payable. The owners of the logs, therefore, must have had a right to remove them after the

 AU SABLE RIVER BOOM CO. v. SANBORN.

acceptances were given; and if so, there could have been no lien, and a lien once lost could not be revived by the maturing of the acceptances. If once waived it is permanently lost.—*Cowell v. Simpson*, 16 Ves., 275; *Hewison v. Guthrie*, 2 Bing. N. C., 755. If there could be any question of this as between the boom company and the original owners, there could be none as between the company and a third person to whom the property is sold without notice of any claim for services in respect to logs previously delivered. If one by his purchase acquires an immediate right to remove his property, he cannot lose it by any subsequent default of his vendor.

The Howards made their purchase September 20, 1875. One of the acceptances was then out; the other was taken before the boom company was notified of the purchase. While the boom company were justified in continuing to deliver to the Sanborns until they were informed that they had parted with their interest, it does not follow that as against purchasers they could retain a lien for services on logs actually delivered. Purchasers would have no implied notice of such a lien, and if informed that one had existed, but that the logs had been delivered on receiving negotiable paper for the amount, would have had a right to suppose the paper was received in payment.

The judgment must be affirmed, with costs.

The other Justices concurred.

 Hiram Wagar v. Francis C. Stone and others.

Mortgages: Title: Security: Right of possession. A mortgage in this state conveys no title to the mortgagee, but is a security merely for the debt; and the mortgagee before foreclosure has no legal interest in the mortgaged premises and is not entitled to possession.

Mortgages: Foreclosures: Receivers: Rents and profits: Right of possession. The mortgagor being entitled under the statute (*Comp. L.*, § 6263) to the possession, and consequently to the rents and profits of the mortgaged

WAGAR v. STONE.

premises, until such time as his title is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver appointed in the foreclosure suit.

Heard April 10. Decided April 24.

Appeal in Chancery from Kalamazoo Circuit.

Severens, Boudeman & Turner, for complainant, cited: *Kerr on Receivers*, 1, 36, 41-3, 46, 47, 49, and cases cited; *Edwards on Receivers*, 53-55, 60, 351; *Berney v. Sewell*, 1 J. & W., 648; *Sturch v. Young*, 5 Beav., 557; *Ackland v. Graverner*, 31 Beav., 484; *Silver v. Bishop*, 3 Swan, 115, n; *High on Receivers*, §§ 640, 658; *Williams v. Robinson*, 16 Conn., 524; *Beverly v. Brooke*, 4 Gratt., 209; *Cortleyen v. Hathaway*, 3 Stock., 39; *Reid v. Middleton*, T. R., 255; *Aberdeen v. Chitty*, 3 Y. & C., 379; *Meaden v. Sealey*, 6 Harr. Ch., 620; *Holmes v. Bell*, 2 Beav., 298; *Payne v. Atterbury*, Harr. Ch., 414; 4 Kent Com., 152; *Reade v. Hamlin*, Phill. Eq., 128; *Brown v. Chase*, Walk. Ch., 43; *Noyes v. Rich*, 52 Me., 115; *State v. Northern Ry. Co.*, 18 Md., 193; *Henshaw v. Wells*, 9 Humph., 567; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38; *Syracuse City Bank v. Talkman*, 31 Barb., 201; *Post v. Dorr*, 4 Edw. Ch., 412; *Hyman v. Kelly*, 1 Nev., 187; *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Howell v. Ripley*, 10 Paige, 43; *Astor v. Turner*, 11 Paige, 436; *Shotwell v. Smith*, 3 Edw. Ch., 588; *Lofsky v. Manjer*, 3 Sandf. Ch., 69; *Quincy v. Cheeseman*, 4 Id., 381; *Finch v. Houghton*, 19 Wis., 149.

Henry C. Briggs, for defendant Stone, cited: *Comp. L.*, § 6263; *Mundy v. Monroe*, 1 Mich., 68; *Baker v. Pierson*, 5 Mich., 456; *Caruthers v. Humphrey*, 12 Mich., 270; *Crippen v. Morrison*, 13 Mich., 23; *Ladue v. D. & M. R. R. Co.*, 13 Mich., 380; *Newton v. Sly*, 15 Mich., 391; *Hogsett v. Ellis*, 17 Mich., 351; 1 *Hilliard on Mort.*, 199; *Zetter v. Bowman*, 6 Barb., 133; *Weidner v. Foster*, 2 Penn., 23; *Myers v. White*, 1 Rawle, 355; *Syracuse, etc., v. Talkman*, 31 Barb., 201.

MARSTON, J:

The complainant, March 31, 1875, filed his bill to foreclose a mortgage given by defendants Henry and Mary Ann Wagar December 16, 1872. Stone, having bid in a portion of the mortgaged premises at a sale thereof April 6, 1874, on an execution issued in his favor, was made a party defendant. After the cause was at issue, complainant filed

WAGAR V. STONE.

his petition praying that a receiver might be appointed to take charge of, harvest, thresh and market a crop of wheat then growing upon the mortgaged premises, and to have the proceeds thereof applied upon the mortgage debt. Notice was given and a hearing had upon the petition, and a receiver was appointed to harvest and sell the wheat and to bring the proceeds thereof into court. On the 26th day of April, 1876, the receiver filed his report showing one hundred and six dollars and ninety-one cents in his hands, the net proceeds of the wheat. This amount was by order of the court paid over to the register. The premises were on the 8th day of April, 1876, sold under the foreclosure proceedings, and after applying the proceeds of said sale, there was still due the complainant a large balance. Upon the 26th day of April, 1876, complainant filed his petition asking for an order directing the register to pay to him the amount theretofore paid into court by the receiver, to be applied on the balance due upon his mortgage debt. A hearing was had, the prayer of the petitioner denied, and the amount ordered to be paid to Stone, the execution purchaser of the premises upon which the wheat was grown. From this order complainant appealed.

It has become the well settled doctrine in this state that a mortgage conveys no title to the mortgagee. It is but a security for the debt, and until the title passes upon a foreclosure and sale of the property, the mortgagee has no legal interest in the land, and is not entitled to the possession.—*Hogsett v. Ellis*, 17 Mich., 363; *Ladue v. Detroit & M. R. R. Co.*, 13 Mich., 380; *Van Husan v. Kanouse*, 13 Mich., 303; *Caruthers v. Humphrey*, 12 Mich., 270.

The mortgagor is entitled to the possession during the proceedings taken to foreclose the mortgage and until a sale has been made and the title of the purchaser has become absolute, and until the title has become absolute upon a foreclosure of the mortgage, an action of ejectment cannot be maintained by the mortgagee, his assigns or representatives, to recover possession of the mortgaged premises.

WAGAR V. STONE.

—2 *Comp. L.*, § 6263. Since the passage of this act, which prevents the mortgagee from obtaining possession until he has acquired an absolute title to the mortgaged premises, the mortgage binds only the lands. The rents and profits of the land do not enter into or form any part of the security. At the time of giving the security both parties understand that the mortgagor will, and that the mortgagee will not, be entitled to the rents, issues or profits of the mortgaged premises, until the title shall have become absolute upon a foreclosure of the mortgage. Until the happening of this event, the mortgagor has a clear right to the possession and to the income which he may derive therefrom, and the legislature by the passage of this statute contemplated that he should have such possession and income to aid him in paying the debt. It would be a novel doctrine to hold that the mortgagee had a right to the profits incident to ownership, and yet that he had neither a legal title or right to possession. The legislature, in depriving him of the means of enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired, in case he obtained possession before acquiring an absolute title. To deprive him of this particular remedy, and yet allow him in some other proceedings to, in effect, arrive at the same result, would be but a meaningless proceeding, and would not be securing to the mortgagor those substantial rights which it was the evident intent he should have.

We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute. We cannot avoid thinking, however, that for us to so hold would be but a mere evasion of our statute. We are of opinion, therefore, that complainant was not entitled to the moneys paid into court by the receiver, as under our statutes such an officer could not be appointed.

The order of the court below must be affirmed, with costs.

The other Justices concurred.

AMERICAN CIGAR CO. v. FOSTER.

The American Cigar Company v. Frank W. Foster.

Chattel mortgages: Future acquisitions: Filing. A chattel mortgage of a stock of goods made August 31, 1875, which covered expressly not only all goods then in store, but all other goods to be thereafter put there, and which was not filed till November 4, 1875, is held valid as between the parties to bind goods purchased by the mortgagor and added to the stock in the store on October 4, 1875.

Chattel mortgages: Valid as between the parties: Purchaser with notice. The mortgage being valid as between the parties to bind the future additions to the stock, is equally valid as against a subsequent purchaser in good faith of the goods who had actual knowledge of the mortgage; such a purchaser stands on no better footing than his vendor.

Submitted on briefs April 11. Decided April 24.

Case made from Superior Court of Grand Rapids.

J. A. Fairfield, for plaintiff, cited: *Comp. L.*, § 4706; *Tannaill v. Tuttle*, 3 Mich., 105; *People v. Bristol*, 35 Mich., 28; *Montgomery v. Wight*, 8 Mich., 149; *Thompson v. Van Vechten*, 5 Abb. Pr., 437; *Worthington v. Hanna*, 23 Mich., 531; *Leland v. Colver*, 34 Mich., 418; *Eggleston v. Mundy*, 4 Mich., 297.

Blair, Stone & Kingsley, for defendant, cited: *Hamilton v. Rogers*, 8 Md., 301; *Otis v. Still*, 8 Barb., 102; *Rowan v. Sharp's Rifle Manf. Co.*, 29 Conn., 282; 33 Conn., 577; 13 Metc., 17; 2 Story, 630; *Leland v. Colver*, 34 Mich., 418; *Fowler v. Hoffman*, 31 Mich., 215; *Holly v. Brown*, 14 Conn., 254.

CAMPBELL, J:

The plaintiff sued Foster for the conversion of certain goods mortgaged to them by one Johnson on the 31st day of August, 1875. The mortgage covered expressly not only all goods then in store, but all other goods to be thereafter put there. The goods in question were not put there until the 4th of October, 1875. The mortgage was filed November 4th, 1875. Foster bought the goods on the 6th of November, in good faith, but with actual knowledge of the mortgage. The court below held that he held them free of the mortgage.

AMERICAN CIGAR CO. v. FOSTER.

We need not inquire whether this would have been so if he had no such actual knowledge. As between the mortgagees and Johnson there can be no doubt the goods were bound, and the latter could not refuse to deliver them up. We know of no principle which puts a purchaser with notice on any better footing than his vendor. Foster was therefore guilty of the conversion charged against him.

The finding of facts shows the value of the property to have been one hundred and ninety-four dollars. The judgment below must be reversed, and judgment entered against Foster for that sum, with interest from February 17, 1877, the date of the finding, and costs of both courts.

The other Justices concurred.

Hector St. Denis v. Henry G. Saunders and another.

Referees: Finding of facts: Partnership. All conclusions of fact found by a referee are conclusive in a court of review; and his finding that defendants were not partners, can only be disturbed if the facts found by him necessarily created a partnership.

Partnership: Finding of referee: Inferences. And if there was no partnership in fact, the effect of the apparent indications, if warranting any inference, would raise an inference of fact, and where the referee has drawn his own inferences of fact, they cannot be disturbed on review.

Partnership: Cutting cedar posts on shares. Where one owning lands makes an arrangement with another to cut and run the cedar posts on the lands at his own expense on shares, the latter receiving half the posts and paying all the cutting expenses, these expenses cannot be regarded as partnership expenses, nor is the business such as to authorize any necessary inference of partnership.

Submitted on briefs April 11. Decided April 24.

Error to Kent Circuit.

Taggart & Wolcott, for plaintiff in error, cited: *Story on Part.*, §§ 37, 53-61; *Leggett v. Hyde*, 58 N. Y., 275; *Hinman v. Little*, 23 Mich., 484; *Ex parte Hamper*, 17 Ves., 404; *Ex parte Rowlandson*, 1 Rose, 91.

36 MICH.—47.

ST. DENIS v. SAUNDERS.

J. W. & O. C. Ransom, for defendants in error, cited: *Pipp v. Reynolds*, 20 Mich., 88; *Turner v. McCarthy*, 22 Mich., 265; *Story on Part.*, §§ 30, 32, 34, 36, 41-9; *Chase v. Barrett*, 4 Patge, 149; *Manhattan, etc., Co. v. Sears*, 45 N. Y., 797.

CAMPBELL, J.:

St. Denis and his wife were engaged to do work at a lumbering camp under employment by Cardinal, who represented that he and Saunders were partners. When their work was done, Cardinal gave St. Denis a personal order on Saunders to pay the amount and charge it to his account. Saunders did not pay it, and said he had no funds belonging to Cardinal. Suit is now brought against them as partners. The referee, whose report was confirmed, made a finding of facts and concluded there was no partnership. It is claimed his conclusions were wrong.

As we must accept all of his conclusions of fact, we can only disturb this finding if the facts found necessarily created a partnership. They were, so far as bearing on any legal question, as follows. Some from which inferences might possibly have been allowable must be disregarded, as the referee has drawn his own inferences.

Saunders owned land from which he wished to get off the cedar posts. He agreed with Cardinal upon the following terms: *First*, Saunders was to pay for and own half of the camp furniture and bedding, which Cardinal was to take care of. *Second*, he was to furnish outfit and goods and supplies and articles of clothing necessary for the men, for which Cardinal was to bear the entire expense, to be refunded with interest at ten per cent., as hereinafter mentioned. *Third*, Cardinal was to cut, run, and boom the posts, and Saunders was to pay half of the expense of booms and booming ground and of marketing expenses. *Fourth*, out of the sales Saunders was to have half of the gross proceeds, and to be repaid the advances before mentioned, with interest. Cardinal was to have the remainder. In brief, Cardinal was to cut and run the posts at his own

ST. DENIS v. SAUNDERS.

expense on shares, receiving half the posts and paying all the cutting expenses.

Under these circumstances we do not see that the cutting expenses could be regarded as partnership expenses; nor is the business such as to authorize any necessary inference of partnership, when the whole was done on the ground by Cardinal. But if there was no partnership in fact, the effect of the apparent indications, if warranting any inference, could not make it in such a case as this anything but an inference of fact, which we cannot review.

We think, therefore, that there is no legal reason for disturbing the judgment, which must be affirmed, with costs.

The other Justices concurred.

Francis A. Helmer v. Adolph Krolick and others.

Mortgages: Assignee: Negotiable paper: Bona fide holder. An assignee of a mortgage given to secure the payment of a negotiable note is held entitled to the same protection that he would have as assignee of the note without the mortgage.

Promissory notes: Payable on or before a specified time: Due: Bona fide purchaser. A note which is payable "on or before three years from date" is not due until the three years has expired; and a purchaser for value within that time is entitled to the same protection as if the note were made payable three years from date.

Negotiable paper: Bona fide purchaser: Bad faith of payee. It cannot render a purchase of negotiable paper suspicious that the payee has an interest in getting it off his hands; this fact would not necessarily be known to the purchaser, or influence in any manner his action; and in determining whether a purchaser is entitled to be considered a *bona fide* holder, it is his *bona fides*, and not that of the payee, that is in question.

Negotiable paper: Bona fide purchaser: Agent for collection. The fact that the purchaser of negotiable paper, resident in a distant part of the state, employs to collect the same a person who is also agent for the payee, is not very significant as indicating want of good faith in the purchase.

Heard April 11. Decided April 24.

Appeal in Chancery from Ionia Circuit.

HELMER v. KROLICK.

Mitchel & Pratt, for complainant.

Wells & Morse, for defendants.

COOLEY, CH. J:

Several interesting questions of law were discussed in this case, but in the view we take of the facts they cannot affect the decision.

The bill was filed to restrain the collection of a mortgage on complainant's lands, given by herself and her husband to secure the payment of a promissory note of four hundred and fifty-five dollars, made by Benjamin Helmer, the husband, payable to defendant Krolick, and which defendant Hill is now seeking to enforce. The grounds of relief which are relied upon are, that the note was given on a loan by Krolick to Helmer of three hundred and fifty dollars, and that usurious interest to the amount of one hundred and five dollars was included in it, which fact was concealed from complainant, and she was induced to mortgage her lands to secure the payment of the note under the belief, fraudulently induced, that the note was for three hundred and fifty dollars only. The note was payable to bearer, but it is claimed that Hill (the usury and fraud being made out by the evidence) is not entitled to the protection of a *bona fide* holder until he shows that he purchased the securities in good faith and for value paid before payment was due; and this it is claimed he has not done. Complainant has made a tender of the amount of the admitted loan and interest, and relies upon this as a discharge of the mortgage.

As the note was payable on or before three years from date, it will be apparent from the statement here made of complainant's case that it depends altogether upon the question whether Hill is or is not entitled to the protection which the law accords to a *bona fide* holder of negotiable paper. It has been decided in this state that the assignee of a mortgage which is given to secure the payment of a nego-

HELMER v. KROLICK.

tible note is entitled to the same protection that he would have as assignee of the note without the mortgage: *Dutton v. Ives*, 5 Mich., 515; and the case of defendant Hill is therefore relieved of one difficulty which would exist in states where a different conclusion has been reached on that point. It is also held that paper which is payable "on or before" a certain time, is not due until that time.—*Mattison v. Marks*, 31 Mich., 421. If, therefore, Hill is shown to have been holder of the securities for value before the three years had expired, his defense would seem to be complete.

The testimony of Krolick is, that he sold the note to Hill before it fell due, and received payment for it. Hill is not called as a witness, and there is no other evidence on the point. It is argued that Krolick's evidence is suspicious; that he had a motive in getting the note into the hands of a *bona fide* holder, knowing that a defense would be made to it in his hands; that the particulars of the transaction between him and Hill are not shown; that the securities were at once placed in the hands of an agent of Krolick for collection, and that in fact it is not shown that Hill ever had them at all. Hill's possession of the securities before they were due is shown, however, by the fact that he sent them for collection enclosed in a letter written by himself. There is force in some of the criticisms made to the testimony of Krolick, but not sufficient, we think, to justify us in rejecting it. It cannot render a purchase of negotiable paper suspicious that the payee has an interest in getting it off his hands. This fact would not necessarily be known to the purchaser, or influence in any manner his action; and in a case like this it is his *bona fides* that is in question, not that of the payee. Nor is it a very significant fact that Hill employs to collect the moneys the person who is also agent for Krolick. The debtor resided in a part of the state distant from Hill's place of residence, and if the transaction between Krolick and Hill was perfectly fair and legitimate the latter would be likely to seek from the former information regarding a suitable collecting agent. Indeed he would be more likely to em-

HELMER v. KROLYCK.

ploy Krolick's agent under such circumstances than he would if the parties were making a sham transfer, and were desirous of giving to it as much as possible an appearance of fairness. Other circumstances which have been commented on as suspicious we do not consider in detail, because none of them singly, or all taken together, are sufficient to convince us that Hill has not shown himself a purchaser in good faith. They are circumstances that would be important in connection with others, but not of a convincing nature by themselves.

The decree dismissing the bill must be affirmed, with costs.

The other Justices concurred.

Nathan P. Hayes and another v. Hannah P. Homer.

Notice: Evidence: Weight: Tendency: Question for jury. Where it is a material question whether a party had notice of a certain fact, it is not proper, where there is a contest upon the facts, for the court to charge that there was no evidence tending to show such notice, except in a case free from doubt. Ordinarily not only the weight but the tendency of the evidence, when once introduced, becomes a question for the jury, who are to examine it and give it such effect in the light of all the facts as they think it fairly entitled to.

Record: Absence of evidence: Bill of exceptions. Where the bill of exceptions does not purport to give all the evidence in the case, although it states that the substance of the entire testimony on the part of the plaintiff is given, it would hardly be safe to hold there was no evidence tending to show a particular fact and on that basis to overturn the ruling of the trial court refusing to so charge.

Weight of evidence: Credibility: Question for jury. There being evidence of a witness fairly tending to show that he notified the party of the fact, of which it is claimed there was no evidence of notice, it will not be held the court erred in refusing to charge there was no evidence of such notice, notwithstanding the cross-examination of the witness who testified to it may have shaken his testimony; the proper effect to be given to his entire testimony as a whole was for the jury, and not for the court, to determine.

Heard April 11. Decided April 24.

Error to Ionia Circuit.

HAYES v. HOMER.

Mitchel & Pratt, for plaintiffs in error.

Lemuel Chute, for defendant in error.

MARSTON, J:

Defendant in error, being the owner of a certain promissory note dated May 27, 1868, for the sum of two thousand two hundred and two dollars and forty cents, in the spring of 1873, the note being then past due, gave it to her husband with authority to use the same to the amount of one thousand dollars in the purchase of logs. Her husband, Wilson P. Homer, showed the note to Mr. Webber, one of the plaintiffs in error, and spoke to him about using the note as collateral security, informing Webber at the time that it belonged to his wife. Webber then said the note would be good with Mrs. Homer's endorsement on the back. Some two months afterwards Wilson P. Homer had another conversation with Mr. Webber, who directed him (Homer) to Mr. Hayes, who would let him have the money. Mr. Homer then went and saw Mr. Hayes and showed him the note; he was satisfied with the note as a collateral, and agreed to let Mr. Homer have the money. Wilson P. Homer was a member of the firm of Homer & Marcy. This note was then pledged as a collateral, and nine hundred and sixty dollars borrowed by the firm, which was afterwards increased to two thousand two hundred and fifty-nine dollars and ninety cents. While the note was thus pledged, Mrs. Homer called at the bank where it was, and on several occasions received the interest thereon as it became due. She, on these occasions, supposed it was pledged for the amount of one thousand dollars, as she had consented it should be. She afterwards demanded back the note, and on refusal commenced an action of assumpsit to recover the amount thereof, and obtained a verdict and judgment for the sum of eleven hundred and fifty-nine dollars and forty-three cents. Several errors were assigned, but plaintiffs in error in this court abandoned all but one, viz.: that there

HAYES v. HOMER.

was a total absence of any showing in the case that Hayes and Webber had notice that Mr. Homer or Homer & Marcy were only authorized to pledge the note in question with them for the sum of one thousand dollars, and they insist that the court below should have so instructed the jury.

If the evidence introduced had no tendency to show such notice, then the court might very properly have so instructed the jury and directed them to find a verdict for the defendants. This can only be done, however, in a case free from doubt, where there is a contest upon the facts. Ordinarily not only the weight but the tendency of the evidence, when once introduced, becomes a question for the jury, who are to examine it and give it such effect in the light of all the facts as they think it fairly entitled to. In *Perrott v. Shearer*, 17 Mich., 54, it was said that "when evidence is submitted to a jury as bearing upon a certain point, it is for them, and not for the court, to determine whether it tends to establish that point or not. Whether it does so, in their opinion, may depend, not alone upon that particular item of evidence, but upon that evidence considered in its relation to other evidence, which may so far qualify and explain it that it shall have no tendency whatever to prove the position for which it was offered, and which, if it were the sole evidence in the case, it might appear to establish. The duty to examine, weigh and compare in these cases is not entrusted to the judge, and when he is asked to instruct the jury that the evidence tends to prove a certain fact he is in effect requested to give a direction to their judgment, which may, if they follow him, overrule and control their own convictions."—See also *Blackwood v. Brown*, 32 Mich., 107, and cases there cited.

It is to be observed of the case of *Perrott v. Shearer*, that the point which the court was requested to instruct the jury the evidence tended to establish, was not the main fact, or any necessary fact in the case, but only a fact from which some necessary fact might be inferred, so that in effect the court was requested to lead the jury from step to

HAYES v. HOMER.

step to the main fact in controversy. That the evidence has a tendency to make out a case or defense, the judge always decides in admitting it, and there can be no objection to his saying so afterwards; but even then the final determination must in the same connection be left to the jury.

The evidence does not all appear in the bill of exceptions, although it states that the substance of the entire testimony on the part of the plaintiff is given. It might be dangerous for us to say that there was no evidence tending to show such knowledge, where the evidence is not all before us. In this case, however, we have no difficulty, as an examination of the record satisfies us that the evidence of Wilson P. Homer fairly tends to show that he so notified the defendant Marcy before pledging the note, and although the cross-examination of this witness may have somewhat shaken the testimony given on direct examination, yet the proper effect to be given to his entire testimony as a whole was for the jury and not for the court. It was peculiarly within their province, and the court below being satisfied with the conclusion at which they arrived, we have no power to weigh the evidence given and disturb the verdict.

We are of opinion that the judgment should be affirmed, with costs.

The other Justices concurred.

The People on the relation of Albert Pack v. The Supervisors of Presque Isle County.

Mandamus: Doubtful rights. *Mandamus* will not issue to enforce any doubtful right.

Mandamus: Warrants for county buildings: Vote of people. Under the statute (Comp. L. 1871, § 477) it requires a popular vote to authorize the borrowing or raising by tax for building purposes in any one year

PACK V. SUPERVISORS OF PRESQUE ISLE COUNTY.

by a county, of a sum exceeding one thousand dollars; and *mandamus* is refused to compel provision to be made by taxation to pay warrants amounting to twenty-six hundred and forty dollars, purporting to have been issued by a board of supervisors for county building purposes between June, 1874, and January, 1875, where the question of raising or borrowing this money has never been submitted to a vote of the people, the relator having notice of the invalidity of the warrants.

Removal of county seat: Designation of place. Proceedings to remove a county seat, which fail to designate the place to which the proposed removal is to be made, are held invalid.

Mandamus: Supervisors' warrants: Existence of county. On this application for *mandamus* to compel the raising a tax to pay warrants purporting to be issued by a board of supervisors, the question of the validity of the proceedings to organize the county, not being essential to the decision of the case, is not determined.

Submitted on briefs April 12. Decided April 24.

Application for Mandamus.

Victor C. Burnham and Atkinson & Atkinson, for relator.

Phillip O'Farrell and S. S. Olds, for respondents.

CAMPBELL, J:

A *mandamus* is sought for to compel provision to be made by taxation to pay certain warrants issued in June and November, 1874, and January, 1875, purporting to be dated at Crawford's Quarry, and to have been issued by order of the board of supervisors, signed by J. Burnham, chairman, and Frederick Denny Larke, clerk.

The answer, which is not controverted by the relator, denies that the county had any legal organization until after the act of 1875, which made adequate provision for it, and treated it as then unorganized; that in 1870 a single township, of Rogers, not embracing the whole county, was organized by the supervisors of Alpena, to which Presque Isle county was then attached. A statute was passed in 1871, providing for its separate organization, but creating no new townships. This statute provided for election of county officers during that spring, or at any future time, on 'ten days' notice, given by the clerk of Rogers, and fixed the county seat at Rogers City until lawfully removed. On the

PACK V. SUPERVISORS OF PRESQUE ISLE COUNTY.

29th of July, 1871, the board of supervisors of Alpena county took steps to organize another township, of Presque Isle, including a part of the township of Rogers, and some other territory, but leaving several surveyed townships, with inhabitants, outside of either of those towns so organized, and outside of any organized township.

In 1875 the legislature, treating Presque Isle county as still unorganized, divided it into townships, and made the other necessary arrangements to give it legal existence.

In 1874 Frederick Burnham and Leonard C. Crawford, as supervisors, held a meeting at Crawford's Quarry (and not at Rogers City), and adjourned from the 13th to the 28th of February, when they passed a resolution declaring it expedient to remove the county seat from Rogers City to Crawford's Quarry, and for submitting the question of removal to a vote of the inhabitants of the several townships in the county on the 6th of April. The meeting of February 13th is averred to have been illegal, and without notice to the clerk, or his deputy, neither of whom attended that or the adjourned meeting.

The warrants in question, amounting to twenty-six hundred and forty dollars, were issued upon a contract for county buildings, and all issued within seven months. The question of raising or borrowing money was never submitted to a vote of the people. The statute requires all sums beyond one thousand dollars, for building purposes, to be authorized by a popular vote.—*C. L.*, § 477.

It also appears that no notice was given of the place to which it was proposed to remove the county seat, which is the especial question on which the vote of the people is to be taken.—*C. L.*, § 483.

It also appears that there are no orders or resolutions in the records of the board of supervisors authorizing the issue of the warrants in question. It further appears that while the warrants are issued nominally to Samuel Boggs, payable to him or bearer, he being nominal contractor for said buildings, yet the relator was the real party in interest,

PACK V. SUPERVISORS OF PRESQUE ISLE COUNTY.

informed of all the facts, and that the warrants were delivered to his own agent.

Under these circumstances we are not disposed to discuss the question when the county of Presque Isle was organized, or to enter upon the examination of the other questions concerning the townships.

A *mandamus* will not issue to enforce any doubtful right. The answer, for the purposes of the present controversy, is taken as true; and if true, it shows that these warrants were issued without authority, to a party having notice of their invalidity, and for a purpose which was illegal. It cannot be claimed, as this record stands, that the county buildings were lawfully contracted for, nor that the county seat had been removed, if the county itself was in existence. There has been no legislative recognition of the removal, and even if lawfully removed, the contract for buildings for more than one thousand dollars was unauthorized.

Acting upon this answer as admitted, we must deny the *mandamus*, with costs against the relator.

COOLEY, CH. J., and GRAVES, J., concurred.

MARSTON, J., did not sit in this case.

Emanuel Lieberman v. Bernard Barman.

Guaranty: Condition: Performance: Construction. A guaranty of payment of notes of third persons, to be paid out of the proceeds of a stock of goods belonging to the makers of the notes and on which the guarantor had a mortgage, the stock of goods then being held on a writ of replevin by an outside party, and the guaranty being conditioned to become operative only in the event of the guarantor getting possession of the goods under his mortgage, is held not effectual to make the guarantor liable in case of his failure to get possession of the goods, notwithstanding out of the litigation for possession of the goods he received some portion of the proceeds of the goods, but less than enough to satisfy his mortgage.

LIEBERMAN v. BARMAN.

Guaranty: Condition: Construction. The condition in the guaranty, that it should become operative only in the event of the guarantor getting possession of the goods on his mortgage, would not be answered by the guarantor's merely getting payment of his mortgage debt; the natural and obvious sense of the words of the condition import something more than this, and there is nothing to warrant a departure from that sense in construing the guaranty.

Submitted on briefs April 19. Decided April 24.

Error to Superior Court of Detroit.

Atkinson & Atkinson, for plaintiff in error.

Crofoot & Kudner, for defendant in error.

GRAVES, J:

Lieberman sued upon two small notes made by defendants and on a provisional guaranty of payment of defendant of two other notes given respectively for three hundred and seventy-eight dollars and some cents by A. M. Barman & Bro.

He was allowed to recover on the small notes, but a verdict was found against him on the guaranty, by direction of the court. He now asks a reversal on writ of error and bill of exceptions. The substantial question is, whether the court erred in ruling against his right to recover on the guaranty, there being no preliminary points in the way. If there is any ground on which the ruling should be justified, there can be no occasion to look further. The verdict ought not to be disturbed.

Some explanation is expedient.

A. M. Barman & Bro. were merchandizing at Lapeer, and defendant Bernard Barman held a mortgage on their stock, given in 1873, for six thousand dollars. Mr. Henry, a deputy sheriff, took part of the stock on an attachment, and soon after one Hyman, by replevin in the court of the United States against Henry, Barman & Bro. and defendant Bernard Barman, seized the entire stock.

In this state of things and on January 30, 1874, the defendant gave Lieberman & Schloss the guaranty in ques-

LIEBERMAN v. BARMAN.

tion. It was as follows: "Lieberman & Schloss holding two notes made by A. M. Barman & Co., payable to the order of Lieberman & Schloss in sixty days and four months from the date thereof respectively, one bearing date October 18, 1873, and the other bearing the date of January 10, 1874, now in consideration of the promise of Lieberman & Schloss to extend the time of payment of said notes for the period of thirty days from the day they are respectively due and payable, I, the undersigned, do hereby guaranty the payment of said notes at the expiration of said thirty days' extension, the same to be paid out of the proceeds of the stock of goods of said A. M. Barman & Co. in the village of Lapeer, on which I have a mortgage, this guaranty to be operative only if I shall get the possession of said stock of goods under said mortgage.—*B. Barman.*"

When replevied by Hyman, the stock was appraised at seventeen thousand dollars.

Within a day or two after this guaranty was given, and on the 3d of February, Freedman Bros. filed a petition in bankruptcy against A. M. Barman & Bro., and an order to show cause was granted.

March 5th Lieberman & Schloss became intervening petitioners, and set up the indebtedness of A. M. Barman & Bro. on the notes covered by the guaranty. March 21st A. M. Barman & Bro. were adjudged bankrupts, and on April 19th Lieberman & Schloss proved their claim on the two notes. A tedious and expensive litigation grew out of the conflicting claims to the stock of goods of A. M. Barman & Bro. The assignee in bankruptcy was substituted as defendant in Hyman's suit. The defendant Bernard Barman never got possession of the goods. He obtained at last only four thousand seven hundred and sixty-five dollars and thirteen cents of the proceeds. It is hardly needful to trace the circuities. The plaintiff became sole owner of the guaranty, and in setting forth his cause of action upon it, he averred in literal terms the accruing of the contingency or condition on which the guaranty was to become operative.

LIEBERMAN v. BARMAN.

The plaintiff's counsel now argues that the sense of the guaranty was, that defendant should be bound for the payment of the notes of A. M. Barman & Bro. if he succeeded in getting in his own mortgage debt, and he next insists that defendant virtually and in legal effect accepted what he received in place of possession, and hence became fixed on the guaranty as fully as he would have been if he had received actual possession.

The reason for the position, that the expression as to getting possession as a prerequisite to the operation of the guaranty only meant that defendant should first obtain payment of his mortgage debt, is said to be, that if defendant had acquired possession he could not have held it for any purpose except to obtain the mortgage debt, and would have been compelled to yield possession on getting that. This is not satisfactory. The reasoning proceeds on the unwarranted assumption that defendant could not have contemplated and did not contemplate any power over the goods except such as would depend on the mortgage alone. It tacitly denies that there was any arrangement or understanding between defendant and his mortgagors, and whom he was in the act of helping, for appropriating any of the stock to satisfy the two notes. The evidence affords no ground for the assumption that defendant was not influenced by some arrangement or understanding with A. M. Barman & Bro. There is no proof of that kind. We do not know what understanding existed between defendant and his mortgagors to induce him to take the risk indicated by the guaranty. Reasoning from experience, it would be natural to suppose that there was some arrangement or understanding on which defendant acted. The notes were liabilities of A. M. Barman & Bro., and not of defendant, and it would hardly be reasonable to assume without evidence that when he stepped in to secure an extension, and in consideration of it agreed to pay the notes out of the stock mortgaged to him, in case he should get possession of it, he had no understanding whatever with the owners of the stock to

LIEBERMAN v. BARMAN.

warrant his promise, and meant that the amount of the notes should come out of his mortgage demand, in case he obtained that and nothing more; and yet the plaintiff claims that such was the nature of the arrangement. The position does not appear tenable. If it were admitted, however, that defendant had no right except what his mortgage gave him, the result claimed by the plaintiff would not be a necessary one. But there is no occasion to examine the question in this aspect. It is sufficient that the ground taken by the plaintiff is not maintainable. There is nothing to warrant a departure from the natural and obvious sense of the words. The guaranty was to become effective, not on defendant's receipt of his mortgage debt, but on the acquisition of possession of the mortgaged goods, and the declaration, following this sense, averred that possession was obtained. The averment was material. The proof showed that possession was not obtained, and further that defendant, after the deduction of necessary legal expenses, received only some two-thirds of his mortgage debt. We need not inquire whether the case would not fail on the ground of variance between the averment of fact on which the operation of the guaranty depended, and the proof of facts which it is claimed satisfied the legal effect of the condition in the guaranty. The event on which the guaranty was to become obligatory was shown not to have occurred, and the ruling of the court was correct.

The judgment should be affirmed, with costs.

The other Justices concurred.

SINGER MANUF. CO. v. HAINES.

The Singer Manufacturing Company v. Charles A. Haines.*Sales: Promissory note: Agreement to receive pay in labor: Construction.*

Defendant having purchased a sewing machine of plaintiff's agent, to be paid for in work, giving his note for the purchase price and receiving back from the agent an agreement to take the amount in work, to apply on the machine, it was held, in an action on the note, that the note and the other writing were to be construed together as one transaction, and that it was unimportant whether the labor was to be received by the company or its agent, so long as it was a fundamental part of the agreement that defendant should be allowed to pay in services and not be bound to pay in money.

Submitted on briefs April 12. Decided April 24.

Case made from Kent Circuit.

D. E. Corbitt, for plaintiff.

E. A. Dapper, for defendant.

GRAVES, J:

This action was brought by the company on a promissory note made to it by Haines for eighty-five dollars, being the price of a sewing machine.

In selling the machine and taking the note, the company acted through its agent, one J. M. Wyand.

As matter of defense against the note, Haines testified, under objection, that Wyand called on him several times to sell him a machine, and that he told Wyand he did not want to pay the money for one, under any consideration; that Wyand then observed that he was going to build a house, and that he, Haines, might work on the house enough to pay for the machine; that the note was then given and a writing received back from Wyand, in regard to paying in work; that he, Haines, subsequently offered his services to Wyand but the offer was not accepted. The writing before mentioned was then admitted in evidence under objection. It was in these terms:

36 MICH.—49.

 SINGER MANUF. CO. v. HAINES.

"May 16th, '74.

"I agree to take the amount of eighty-five dollars in work, which work will apply on the machine.

"J. M. WYAND."

. It is contended that the admission of this matter was improper.. A majority of the court think, however, that it was both pertinent and important, as going to explain the real transaction, and as tending to establish that the actual consideration to be rendered by Haines was labor and not cash; that it was unimportant whether the labor was to be received by the company or by its agent, so long as it was a fundamental part of the agreement that Haines should be allowed to pay in his services and should not be bound to pay in money; that the note and other writing should be taken and construed together, in order to show the true nature of the transaction; and when so viewed, no doubt is felt. There is no ground for disturbing the judgment, and it must be affirmed, with costs.

The other Justices concurred.

John P. Marble v. Emily U. Marble.

Divorce: Adultery: Bill of complaint: Charge of living "in open and notorious adultery." The charge in a divorce bill of living "in open and notorious adultery" with a person named, the time and place being given, is held to be sufficient. Such an allegation would require as satisfactory proof of the adultery as though a single offense only were charged, and in addition thereto evidence of the matter of aggravation.

Adultery: Divorce: Proofs: Circumstantial evidence. The evidence of adultery in this case is held sufficient and convincing, though it is circumstantial only.

Divorce: Adultery: Reputation: Evidence. Evidence of reputation is not admissible as substantive proof to show adultery, but it may be considered only as subsidiary and subordinate evidence, as matter in aid of and incidental to the substantive proof and going to explain and account for the conduct of the parties towards each other.

Submitted on briefs April 12. Decided April 24.

Appeal in Chancery from Ingham Circuit.

MARBLE V. MARBLE.

M. V. & R. A. Montgomery, for complainant.

J. C. Shields, for defendant.

GRAVES, J:

This is a bill for divorce. The circuit court decreed for complainant, and defendant appealed. The charge of living "in open and notorious adultery" with William Martin, is the only one to be considered. The proofs fail to support any other. It is objected that this charge is not a proper one in a divorce case. On consideration we are inclined to think the allegation is valid. The time and place are laid and the party incriminated with defendant is described and specified. As characterized by the form of charge, the offense would seem to be more gross and noxious, more pernicious to society, than one consisting of a single private act. And there is no reason to suppose the pleading of it in this wise could cause any special hardship to the defendant.

The allegation would require as satisfactory proof of the adultery as though the offense were set out as composed of one act only, and the complainant would naturally be held to give evidence of the matter of aggravation also.

The evidence to show the fact of adultery is made up of circumstances. There is no direct proof of any single fact able to afford a conclusive or very stringent inference. But when all the circumstances are combined and the natural inferences and presumptions are allowed their due weight, the proof so presses and convinces that it is difficult to reject belief. The conduct of Martin in leaving his own family in the immediate neighborhood and staying with defendant as he did, their association and deportment towards each other and fondness for each other's society, their bearing even in the presence of third persons, their desire to be together, her interference in his behalf, and the tone and character of it, her explanation to Mr. Mead in Martin's presence why Martin did not depart from her and consort with his wife, the inconsistent and unsatisfactory statements

MARBLE V. MARBLE.

concerning Martin's ways and inducements, and several other incidents, when brought together, seem hardly capable of being accounted for and explained except upon the ground that the relation charged actually existed between these persons. The evidence of reputation was not admissible as substantive proof to show the adultery. It can be considered only as subsidiary and subordinate evidence, as matter in aid of and incidental to the substantive proof and going to explain and account for the conduct of the parties towards each other.—*Clement v. Kimball*, 98 Mass., 535. And viewed in that light, it gives a strong color to the other facts. The decree should be affirmed.

The other Justices concurred.

Abiel T. Vary v. John Shea and another.

Mistake: Contracts: Evidence: Deliberation. The evidence of mistake in a written contract, on which the court should act in giving relief, ought to be so clear as to establish the fact beyond cavil; and especially when the party setting up the mistake has had the contract prepared by his own professional adviser, and apparently with care and deliberation.

Contracts: Construction. In construing a contract all its parts must be examined, and effect given to every word and phrase if practicable; and where one clause of a contract provides expressly for complainant's paying over to defendant certain surplus moneys mentioned therein, a construction of another clause not clearly demanding it, such as to authorize the complainant to retain in his own hands the major part of that surplus, is not admissible.

Contracts: Construction: Agreement to discharge mortgage: "Expense." A provision in a contract that a party shall discharge his mortgage "at the expense" of the mortgagor, imports, in the absence of explanation, that he is to do it on being reimbursed the expense attending the drawing, execution and recording of the discharge, and not that he is to do it only on being paid the amount called for by the mortgage, as well as reimbursed such expense.

Equity jurisprudence: Affirmative relief: Cross-bill. Affirmative relief will not be granted to defendants in a chancery cause, in the absence of any cross-bill.

Heard April 11. Decided April 24.

Appeal in Chancery from Calhoun Circuit.

VARY v. SHEA.

W. D. Adams, for complainant.

James H. Campbell, for defendants.

A court of equity, in order to ascertain and carry out the intention of parties to a particular transaction, will look at their situation and the whole transaction between them: *Frink v. Cole*, 19 Ill., 339.

To enable a court of equity, upon the ground of mistake, to reform a written contract, the mistake must be proved to be the mistake of both parties, so that by correcting the writing as requested, the court will make it express the contract designed to be entered into by both.

Where there has been no fraud or surprise to put the applicant for relief on his guard, it must appear that the mistake was not the consequence of his own want of recollection from inattention or of his own carelessness: *Deman v. Providence, etc., R. R. Co.*, 5 R. L., 130; *Wood v. Patterson*, 4 Md. Ch., 335.

Chancery will exercise the power of reforming a written contract, sparingly and with great caution and only on the clearest proof of the intention of the parties and of the accident or mistake upon which the jurisdiction is invoked: *Reese v. Wyman*, 9 Ga., 430; *Lockhart v. Cameron*, 29 Ala., 355; *Ligon v. Rogers*, 12 Ga., 281; *Hunter v. Bilsen*, 30 Ill., 288; *Cleary v. Babcock*, 41 Ill., 271; *Davidson v. Geer*, 3 Sneed (Tenn.), 384; *Linn v. Barkey*, 7 Ind., 69; *Hall v. Clagett*, 2 Md. Ch., 151; *Leitensdorfer v. Delphy*, 15 Mo., 160; *Wemple v. Stewart*, 22 Barb., 154; *N. Y. Ice Co. v. N. W., etc., Ins. Co.*, 31 Barb., 72; *City R. R. Co. v. Veeder*, 17 Ohio, 385; *Shirely v. Welch*, 2 Oreg., 288; *Bailey v. Bailey*, 8 Humph., 230; *Lake v. Meechan*, 13 Wis., 355; *Fowler v. Adams*, 13 Wis., 458; *Miner v. Hess*, 47 Ill., 170; *Lyman v. United States Ins. Co.*, 2 Johns. Ch., 630; *Shay v. Pettes*, 35 Ill., 360; *Adams v. Robertson*, 37 Ill., 45; *Triplett v. Gill*, 7 J. J. Marsh., 432; *Watkins v. Storkett*, 6 Har. & J., 435; *Goldsborough v. Ringgold*, 1 Md. Ch., 239; *National Ins. Co. v. Crane*, 16 Md., 260; *Harrington v. Harrington*, 3 Miss., 701; *Lyman v. U. S. Ins. Co.*, 17 Johns., 273; *Pennell v. Wilson*, 2 Abb. Pr. N. S., 666; 2 Robt., 505; *Broadwell v. Broadwell*, 6 Ill., 599.

To the same effect: *Tripp v. Hascetig*, 20 Mich., 263; *Case v. Peters*, 20 Mich., 298.

The mistake of one party not enough, must have been mutual: *Mills v. Lewis*, 55 Barb., 179; 37 How. (N. Y.) Pr., 418; *Larier v. Wyman*, 5 Robt., 147; *Penell v. Wilson*, 2 Id., 505; 2 Abb. Pr. N. S., 466; *Brainard v. Arnold*, 27 Conn., 617;

VARY v. SHEA.

Nevins v. Dunlap, 33 N. Y., 676; *Briose v. Pacific, etc., Co.*, 4 Daly, 246; *Nelson v. Davis*, 40 Ind., 366.

It is settled that equity will not relieve against a mistake where there is no element of fraud, imposition, undue influence, imbecility of mind, or the like, inferrible from the transaction: *Gwynn v. Hamilton*, 29 Ala., 233; *Jusan v. Toumin*, 9 Ala., 662; *Campbell v. Carter*, 14 Ill., 286; *Gordere v. Downing*, 18 Ill., 492; *Atlantic Fire, etc., Ins. Co. v. Wilson*, 5 R. L., 479; *Dow v. Kerr, Spears (S. C.) Ch.*, 413.

Mistake must be conclusively proved: *Kennedy v. Umbaugh, Wright (Ohio)*, 327; *Gray v. Woods*, 4 Blackf., (Ind.), 432; *U. S. v. Munroe*, 5 Mass., 572; *Griswold v. Smith*, 10 Vt., 462; *Lyman v. Little*, 15 Vt., 576; *Preston v. Whitcomb*, 17 Vt., 183; *Cleveland v. Burton*, 11 Vt., 138; *Miner v. Hess*, 47 Ill., 170; beyond a reasonable doubt, not merely by preponderance of evidence: *Stockbridge v. Hudson, etc.*, 102 Mass., 45.

Both the original intent and the fact of mistake must be established beyond a reasonable doubt, in order to entitle the parties to relief in equity: *Newton v. Holley*, 6 Wis., 592; *Coffing v. Taylor*, 16 Ill., 457; see also *Arnold v. Fowler*, 44 Ala., 167; *Picton v. Graham*, 2 Disau. (S. C.), 592; *Lamb v. Harris*, 8 Ga., 546; *Emmons v. Stahlnecker*, 11 Pa. St., 366; *Salmon Falls, etc., Co. v. Portsmouth Co.*, 46 N. H., 249; *Broadman v. Davidson*, 7 Abb. Pr. N. S., 439; *Edmond's Appeal*, 59 Pa. St., 220; *Arnold v. Fowler*, 44 Ala., 167; *Goltra v. Sanasack*, 53 Ill., 456; *Bunse v. Agee*, 47 Mo., 270; *Harter v. Christoph*, 32 Wis., 248; *Heavenridge v. Mondy*, 49 Ind., 434; *Rufner v. McConnell*, 17 Ill., 212.

COOLEY, CH. J:

The purpose of this suit is to obtain the reformation of a contract into which it is alleged an error has crept through mistake.

The contract bears date April 5, 1872. To an understanding of the alleged mistake it will be necessary to state the facts respecting which the parties were then in negotiation.

The defendant John Shea was the owner of three parcels of land in Calhoun county, the value of which is estimated at from twelve to fourteen thousand dollars, and which were encumbered to the amount of about eleven thousand dollars by mortgages, known as the Reed mortgage,

VARY V. SHEA.

the Stringer mortgage, the William Vary mortgage, the Miller mortgage and the A. T. Vary mortgage. All these mortgages except the Stringer mortgage were then owned or controlled by Abiel T. Vary, the complainant. Miller had also an execution levy on the lands for about four hundred and fifty dollars, which was controlled by the complainant, and on one parcel there was due to the state three hundred and sixty dollars. In this condition of affairs the complainant appears to have been desirous of realizing on the securities he owned or controlled, and defendant John Shea was also desirous of selling a portion of the land to obtain means of payment. In the preceding December, Shea had made a contract with one Bly by which he bargained to convey to Bly one parcel of the land for the price of eight thousand dollars. But it was made a part of the agreement that Shea within forty days should procure the Stringer mortgage, on which something like twenty-nine hundred dollars was owing, to be discharged. This discharge Shea failed to obtain, and the contract fell to the ground in consequence. Had it been carried out, the eight thousand dollars was to have been paid to complainant to apply on the incumbrances owned or controlled by him.

The steps leading to further negotiations between the parties to this suit are not very fully explained, but it will be sufficient to state, that previous to April 5, 1872, it had been ascertained that one Rulifson would loan to Shea four thousand dollars or thereabouts, and take security therefor on the lands not bargained to Bly, provided the incumbrances were released and the amount owing to the state paid. This sum would enable Shea to pay off the Stringer mortgage and leave a surplus, the amount of which was somewhat uncertain inasmuch as the exact amount required to pay off the Stringer mortgage was not known. It seems to have been supposed that he would submit to some discount in order to obtain his money. The eight thousand dollars which Bly was to pay for the land bargained for by him would fall short a few hundred dollars of paying all the demands owned or controlled by complainant.

VARY v. SHEA.

Two interviews took place between the parties April 5th, in the course of which complainant was in consultation with his counsel, and the interviews led to the drawing up of a contract in the office of the counsel. This contract when drawn up Shea refused to sign, and for the time being the negotiations fell through. As it seems to be agreed on all hands that this draft was in accordance with complainant's desires, and that he urged upon Shea its execution, it is given in full here, and will aid, we think, in the determination of the question whether a mistake was afterwards made or not.

"This agreement, made and entered into this fifth day of April, A. D. 1872, by and between Abiel T. Vary, of the township of Marshall, county of Calhoun, and state of Michigan, of the one part, and John Shea and Frances E. Shea, his wife, of the same place, of the other part, witnesseth, that whereas said John Shea and Frances E. Shea have this day made and executed under their hands and seals a certain indenture of mortgage to one Harmon D. Rulifson on the following described lands, situate in the county of Calhoun, and state of Michigan, described as follows, to-wit: the northwest quarter of the southwest quarter and the southwest quarter of the southwest quarter of section twenty-nine and the northwest fractional quarter of the northwest quarter, north of the Kalamazoo river, of section thirty-two, all being in township two south of range six west, together forming one parcel, and containing eighty-four and twenty-seven one-hundredths acres of land more or less, which said mortgage is given to secure the payment to said Harmon D. Rulifson by said John Shea and Frances E. Shea of the sum of four thousand and thirty-six dollars and fifty cents at the expiration of three years from the date thereof, with interest at the rate of ten per cent. per annum, payable semi-annually until said principal sum be paid: *Provided always*, That any part of said principal sum may be paid at any time before due in sums not less than twenty-five dollars at any one time; all sums, both prin-

VARY v. SHEA.

cipal and interest, to be paid at the residence of said Abiel T. Vary, in the town of Marshall aforesaid; and whereas, also, said John Shea and Frances E. Shea have also assigned this day by an instrument under their hands and seals to said Abiel T. Vary the certificate number 644 of sale of university land, bearing date the 4th day of January, A. D. 1851, issued by the commissioner of the state land office of the state of Michigan;

“Now, therefore, in consideration of the premises, the said Abiel T. Vary doth covenant and agree, to and with the said John Shea and Frances E. Shea, that he will, on the best and most advantageous terms, pay and satisfy and cause to be discharged of record a certain indenture of mortgage, bearing date on or about the 3d day of November, A. D. 1866, made and executed by said John Shea and Frances E. Shea to one William Stringer, and recorded in the office of the register of deeds for the said county of Calhoun, on book LL of mortgages, on page 741, and that in case the amount of said money paid for the discharge of said Stringer mortgage, including expenses, shall be less than said sum of four thousand and thirty-six dollars and fifty cents, he will endorse or cause to be endorsed as paid upon said Rulifson mortgage the surplus thereof to the amount of thirty-six dollars and fifty cents, and will pay to said John Shea and Frances E. Shea the balance of said sum of four thousand and thirty-six dollars and fifty cents, if any, after deducting such amount so paid for the discharge of said Stringer mortgage and necessary expenses, and the sum of three hundred and sixty dollars, being the amount to be paid to the state of Michigan on said certificate, which said sum of three hundred and sixty dollars is due the said state and was included in said mortgage to secure the payment thereof to said state of Michigan, and the amount so endorsed on said mortgage in cash; and also that so soon as said Rulifson mortgage shall be fully paid and satisfied, he will, by a sufficient instrument in writing, under his hand and seal, duly executed, reassign, transfer and set over to said John

VARY V. SHEA.

Shea and Frances E. Shea the said certificate number 644 of sale of university land, and that he will not, so long as said John Shea and Frances E. Shea perform the conditions of said Rulifson mortgage, assign said certificate to any other person or persons, and that said John Shea and Frances E. Shea may, so long as they shall perform the conditions of said Rulifson mortgage, retain possession of and occupy the land mentioned in said certificate.

"And in case said John Shea and Frances E. Shea shall fail to perform the conditions of said Rulifson mortgage, then said certificate shall be sold in the manner provided by law for the foreclosure of mortgages and the proceeds thereof applied to the payment of said Rulifson mortgage.

"It is further agreed that in case said John Shea and Frances E. Shea shall faithfully and in due season pay to the proper officer all interest due and to become due on said certificate, in that case the interest on the sum of three hundred and sixty dollars, parcel of said sum of four thousand and thirty-six dollars and fifty cents, secured by said Rulifson mortgage, as aforesaid, shall be reckoned at seven per cent. per annum instead of ten per cent., as in said mortgage expressed."

This is the contract which complainant desired should be executed, and with the usual attestation clause added, it was drawn up under his direction for signatures of the parties, and its execution by defendants urged. If we direct our attention to the provision contained in it for the disposition of the surplus that would remain of the moneys to be obtained by means of the Rulifson mortgage, after the Stringer mortgage should be paid off, and the amount owing to the state satisfied, it will be manifest that it very plainly and distinctly provides that such surplus shall be paid to the defendants. It is important to bear this in mind, since the mistake which it is claimed crept into the contract relates exclusively to the disposition of this surplus.

Three days later further interviews were had between the parties, complainant seeking the first at an unusual hour in

VARY v. SHEA.

the morning, and exhibiting, as the evidence shows, considerable anxiety to have an understanding of some kind arrived at. If he supposed his securities perfectly available for the sums due upon them, this anxiety would require some explanation, especially as the inferences from the record are that he was not in want of moneys for other uses than investment at interest. On this day, as during the preceding interviews, he was in constant communication with his professional adviser, and had with him the draft of contract above given, which the Sheas still refused to sign, as not sufficiently favorable to their interests. After a good deal of negotiation a clause was added to the draft under complainant's direction, which was supposed to meet their views, and which was as here given, omitting the words included in brackets.

"It is further agreed that said Abiel T. Vary shall discharge, or cause to be discharged, from said lands, and from the lands recently sold by said John Shea and Frances E. Shea to one Caleb C. Bly, all other mortgages, judgments or attachments, at the expense [as to fees of the register of Calhoun county] of John Shea aforesaid.

"The provisions of these presents are declared binding on the respective heirs, executors, administrators and assigns of each of the respective parties hereto."

We are given to understand by complainant's evidence that the proposed contract with this addition was understood by him at the time to be satisfactory to the Sheas, and that the change effected in it by the addition had overcome their objections as he then supposed. At the same time he insists that under the contract as thus amended he would be entitled to exact from the Sheas the whole amount of all the incumbrances, and that his undertaking to discharge them all at "the expense" of John Shea only obligated him to do so on complete payment being received. And as the Rulifson moneys would be in his hands, his construction of the paper is, that he would have had a right to satisfy the balance that should remain on the incumbrances

VARY v. SHEA.

he controlled after the Bly moneys should be applied, from the surplus remaining of the Rulifson moneys after paying off Stringer and the state.

Now as the Sheas had refused to sign the contract as first drawn, and it is manifest from all the evidence that they had been bargaining for concessions and that complainant supposed he had changed the proposed contract in their interest, it is pertinent to inquire in what particular they were bettered by this change. But the slightest consideration of this additional provision will convince one that, if we accept the construction of complainant, the addition effected no important change in the paper. What did it bind complainant to do? Merely this, as he claims: to cause the incumbrances he owned or controlled to be discharged on receiving the amount thereof and the expenses attending the discharge. But this he would have been obliged to do without any such written undertaking, and there is not a man of sense in the community who does not understand that he has a legal right to require a discharge of his mortgages when he satisfies them. Indeed, the statute imposes a penalty on the owner of a mortgage who refuses to discharge it on demand when satisfaction is made, and permits the mortgagor to recover the penalty for his own use.—*Comp. L.*, § 4246. It is, therefore, to our minds incredible that the Sheas should have been for two days bargaining for a right which they must have known they possessed already, or that complainant should have supposed he was yielding any thing in conceding what he must have been perfectly aware he could not refuse.

Defendants, on the other hand, claim that what they were bargaining for was a discharge of the incumbrances controlled by complainant, without further payment after the Bly moneys were applied. In this view they had something tangible and important to negotiate for, and they were satisfied with the contract as amended, except that as the matter of expense in causing the incumbrances to be discharged was in no manner restricted, they feared they might be sub-

VARY V. SHEA.

jected to needless charges in that regard. They therefore insisted on the interlineation of the words "as to fees of the register of Calhoun county," in order that it might be definitely understood what "expense" they could be put to, these words, however, in no manner affecting their right to demand from complainant a discharge of the incumbrances he controlled, without further payment after the Bly moneys were applied; that right being complete under the contract as it stood before these words were interlined. Complainant denies this, and insists that by the interlineation of these words, if they are allowed to have effect as they stand, his right to apply from the Rulifson moneys sufficient to satisfy the incumbrances in his hands is taken away; and this he avers was not the understanding at the time, and it was through mistake and inadvertence that an interlineation was so made as to give the contract that effect.

To account for making the Rulifson mortgage larger than was necessary to obtain moneys sufficient to pay off all the claims, defendants introduce evidence to show that a part of the inducement on their part to enter into the contract was the obtaining money for their own use in building on the land they would retain. They also suggest reasons why complainant was led to assent to a discharge of the incumbrances without receiving full satisfaction, and countervailing reasons are suggested in his behalf. We need not enter upon an examination of these reasons, though it is worthy of notice that Stringer, whose mortgage was prior to all the others except one, consented to a deduction of over two hundred dollars, receiving twenty-seven hundred dollars in full satisfaction. This left in complainant's hands, after the state was paid, over nine hundred dollars, two hundred and ten dollars of which he has paid to defendants, and the rest retained.

We have considered this case with care and cannot accept the construction put by complainant on the contract, as it was drawn before the interlineation was made. In the con-

VARY v. SHEA.

struction of a contract all its parts must be examined, and effect given to every word and phrase if practicable.—*Norris v. Showerman*, Wal. Ch., 206; *S. C. on Appeal*, 2 Doug. (Mich.), 16; *Paddack v. Pardee*, 1 Mich., 421. This is a familiar rule of construction. The clause of the contract which required complainant to pay over to defendants the surplus of the Rulifson moneys must therefore be understood not to conflict with the added clause, but capable of harmonious construction with it. It certainly would not be a harmonious construction that would entitle complainant to retain in his own hands the major part of that surplus. But it is quite unnecessary to apply to the contract any other rules than those which common sense and the ordinary meaning of words would suggest. When one agrees to discharge a mortgage "at the expense" of another, the common understanding of the words would be, in the absence of explanation, that he was to do so on being reimbursed the expense attending the draft, execution and recording of papers. A man holding a mortgage would not agree to discharge it on receiving "the expense" of doing so; he would not regard his interests as sufficiently protected unless he stipulated for payment, as well as for the expenses attending a discharge.

It was said in *Youell v. Allen*, 18 Mich., 107, 109, that the evidence of mistake in a written contract, on which the court should act in giving relief, ought to be so clear as to establish the fact beyond cavil. Especially should this be the case when the party setting up the mistake has had the contract prepared by his own professional adviser, and apparently with care and deliberation. No such satisfactory evidence is found in this case. On the contrary, we think the evidence preponderates in favor of the defense, and that the construction of the contract as complainant would have it would not be what he insists was agreed upon.

This conclusion requires a reversal of the decree, and it must be reversed, with costs, and the bill dismissed. Defendants ask a decree in their favor for the moneys now in

VART V. SHEA.

complainant's hands, but this cannot be awarded. There is no cross-bill, and therefore affirmative relief cannot be given. Moreover, the remedy at law is entirely adequate.

The other Justices concurred.

James M. Barber v. James E. Rorabeck and another.

Homestead: Exemption: Construction. Provisions exempting a homestead from execution are to be liberally construed, especially where the exemption is restricted within limits so very moderate as those which are prescribed in this state; and an intention to modify this right to the prejudice of the debtor, by a statute having other purposes for its object, is not lightly to be inferred.

Homestead: Farm: Extension of village limits. An extension of village limits so as to include a farm occupied as a homestead and within the constitutional exemption as to size and value, will not operate to reduce or diminish the right of exemption to the equivalent of a town lot according to the recorded plat, where the property is still occupied as a homestead and cultivated as a farm.

Submitted on briefs April 12. Decided April 24.

Appeal in Chancery from Eaton Circuit.

M. V. & R. A. Montgomery, for complainant, cited: *Bull v. Conroe*, 13 Wis., 234; *Sarahr v. Fenlan*, 5 Kans., 592.

H. A. Shaw, for defendants, cited: *Rogers v. Rayland*, 42 Tex., 422; *Noland v. Reed*, 38 Id., 425; *Clark v. Noland*, Id., 416; *Brown v. Osgood*, 68 Ill., 178; *Finley v. Dietrick*, 12 Iowa, 516; *Patterson v. King*, 29 Ill., 532; 31 Ill., 200; 7 Mich., 488; 10 Mich., 291; 24 Mich., 447; 26 Mich., 106; *Dillon on Mun. Corp.*, § 126; *Williams v. Star*, 5 Wis., 534; 32 Cal., 172; 17 Mich., 471.

COOLEY, CH. J:

This suit involves the question of a homestead right. It is a suit to foreclose a mortgage on forty-six acres of land

BARBER v. RORABECK.

which the defendants have for nearly twenty years cultivated as a farm and occupied as a homestead. Until 1871 the land was outside the corporate limits of the village of Eaton Rapids, but those limits were extended in 1871 to include it. The land, however, is still occupied as a farm, and the value does not exceed fifteen hundred dollars. In the same year that the corporate limits were extended, but afterwards, the mortgage was given by James E. Rorabeck for money borrowed, his wife, the other defendant, not signing it. Under these circumstances, it is conceded that the mortgage is void as to the homestead legally claimable by defendants, and the question in controversy is, how much that homestead is.

The constitution provides that "every homestead of not exceeding forty acres of land, and the dwelling house thereon, and the appurtenances, to be selected by the owner thereof, and not included in any town plat, city or village; or instead thereof, at the option of the owner, any lot in any city, village or recorded town plat, or such parts of lots as shall be equal thereto, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, not exceeding in value fifteen hundred dollars, shall be exempt," etc. It is not disputed that defendants were entitled to claim forty acres of this land as an exempt homestead prior to the extension of the village limits, but it is insisted that since the extension the right of exemption is limited to the equivalent of a town lot according to the recorded plat. This is the point in dispute between the parties.

In Wisconsin it has been decided that under circumstances like those here stated the debtor is entitled only to a town homestead.—*Bull v. Conroe*, 13 Wis., 233; see *Parker v. King*, 16 Wis., 223. But in the same state it is held that homestead laws must be liberally construed.—*Weisbrod v. Daenicke*, 36 Wis., 73; *Jarvais v. Mos*, 38 Wis., 440, and cases cited. This is a very proper rule of construction when the benevolent purpose of the statute is

BARBER v. RORABECK.

had in view, and it has been adopted by other courts.—*Deere v. Chapman*, 25 Ill., 610; *Webster v. Orne*, 45 Vt., 40-42; and see *Beecher v. Baldy*, 7 Mich., 488.

In Iowa the conclusion is, that an extension of town limits so as to bring in a country homestead cannot deprive the debtor of his right to the full exemption as it existed before.—*Finley v. Dietrick*, 12 Iowa, 516. In Texas the same ruling has been made.—*Nolan v. Reed*, 38 Texas, 425; *Clark v. Nolan*, *Ibid.*, 416. The right once acquired seems to be regarded in that state as a vested right.—*Bassett v. Messner*, 30 Texas, 604. And while it is not strictly that, it is certainly a valuable right, which has been secured to the debtor for substantial reasons of public policy, as well as of individual and family benefit; and an intention to modify it to the prejudice of the debtor, by a statute having other purposes for its object, is not lightly to be inferred. We should say that all implications must be against such an intention. Especially should this be so where the constitutional limitation of a homestead is restricted within limits so very moderate as those which are prescribed in this state.

Our opinion is, that the decree of the court below should have secured to the defendants the homestead they were entitled to before the village limits were extended. As it did not do so, it must be reversed, with costs, and the record remanded for proceedings in conformity to this opinion.

The other Justices concurred.

36 MICH.—51.

HART v. CARPENTER.

Benjamin E. Hart v. Samuel Carpenter and others.

Equity pleading and practice: Sworn answer: Affirmative defense. While an answer called for on oath is to be received as true so far as it is responsive to the averments of the bill, affirmative matters of defense which are thus set up must be proved.

Foreclosures: Payment to adverse claimant: Evidence: Matters equally within knowledge of deceased. Where in defense to a foreclosure bill the existence of paramount outstanding titles to a portion of the lands against which the mortgagee had covenanted by warranty deed of the premises to the mortgagor, is set up, and the payment by the mortgagor to an adverse claimant of a sum which the mortgagee consented should be applied on the mortgage, evidence by the mortgagor, after the death of the mortgagee, of admissions by the latter of the defects in his title and of his consent to application on the mortgage of an amount paid by the mortgagor to an adverse claimant, is held inadmissible under the statute (*Comp. L. 1871, § 5968*) as relating to matters which in his lifetime was equally within the knowledge of the mortgagee, and properly disregarded by the court below.

Foreclosures: Payment to third party: Consent of mortgagee. The sum thus paid out by the mortgagor having been paid in settlement of a dispute growing out of the cutting of timber by a third party on the mortgaged lands, which settlement left a large amount of timber in the mortgagor's hands ready for working up, and the fact that this was cut without expense to him having been taken into account in the settlement, in the absence of evidence of any understanding with the mortgagee that this payment should be applied on the mortgage, or of any reason which, in law or in morals, should require him to consent thereto, the court will not assume that he so agreed, nor compel the application of such payment on the mortgage.

Foreclosures: Amount: Defense: Proofs. The defense that a parcel claimed to have been twice described in the deed of conveyance from the mortgagee to the mortgagor, was twice taken into account in fixing upon the amount of the mortgage, cannot prevail in the absence of proof of the fact.

Submitted on briefs April 12. Decided April 24

Appeal in Chancery from Lapeer Circuit.

N. H. Hart and W. T. Mitchell, for complainant.

W. Hemingway and G. C. Wattles, for defendants.

COOLEY, CH. J:

This is a foreclosure suit, based upon a purchase money mortgage. The bill did not waive an answer on oath, and the mortgagor answered, admitting the mortgage, but setting

HART V. CARPENTER.

up various defenses, the chief of which were, that he received from the mortgagee a warranty deed of the lands, the covenants in which were broken by the existence of paramount outstanding titles to a portion of the land, and that under the advice of the mortgagee he had paid fifteen hundred dollars to one adverse claimant, which should be applied on the mortgage. Also that one parcel of land was twice described in the deed and twice taken into account in computing the amount to be inserted in the mortgage.

The allegations of the answer are not disproved by complainant, and as it was called for on oath, it is claimed by defendant that it must be received as true. This would be so, so far as it is a response to the averments in the bill; but affirmative matters of defense must be proved.—*Schwartz v. Wendell*, Wal. Ch., 267; *Attorney General v. Oakland County Bank*, *Ibid.*, 90; *Van Dyke v. Davis*, 2 Mich., 144; *Hunt v. Thorn*, *Ibid.*, 213; *Roberts v. Miles*, 12 Mich., 297.

The existence of paramount titles was not proved by the production of any documentary or record evidence, but the mortgagor was made a witness on his own behalf, and gave evidence which it is claimed tended to show admissions by the mortgagee of the defects in his title, and a consent that fifteen hundred dollars, which the mortgagor had paid to an adverse claimant, should be accounted for on the mortgage. This evidence was taken after the death of the mortgagee, and as it related to matters which in his lifetime must have been equally within his knowledge, it was inadmissible under the statute, and was properly disregarded in the court below.—*Comp. L.*, § 5968; *Kimball v. Kimball*, 16 Mich., 211; *Wright v. Wilson*, 17 Mich., 192; *Twiss v. George*, 33 Mich., 253. Rejecting this evidence, no part of the defense is found to be established. We are not satisfied that any understanding existed that the fifteen hundred dollars, which was undoubtedly paid by the mortgagor in settlement of a dispute growing out of the cutting of timber by a third party on the mortgaged lands, should be accounted for on the mortgage. The settlement left a

HART V. CARPENTER.

large amount of timber in the mortgagor's hands ready for working up, and the fact that this was cut without expense to him was undoubtedly taken into account by him in negotiating for a settlement. It is not to be assumed that the mortgagee agreed to allow this sum, until a reason is shown which either in law or in morals would require him to do so. As to the parcel said to have been twice described in the deed of conveyance, there is no evidence that it was twice taken into account in fixing upon the amount of the mortgage, and therefore the defense on this point must fail.

The decree must be affirmed, with costs, but with such modifications as will allow the defendants ninety days from this day in which to make payment before a sale under the decree shall be advertised.

The other Justices concurred.

**Douglas Gibson and another v. School District No. 5
of the Township of Vevay.**

School districts: Charts: Appendages of school-house: Director. National Business Multiplication Charts, being charts or cards containing the multiplication table, practical forms of business contracts, and also brief mention of prominent historical events, and designed for use in school-rooms, are held not to be necessary appendages for the school-house, within the meaning of the statute (*Comp. L. 1871, § 3618*), such as the director is required to provide.

Charts: School districts: Discretion of officers: Necessity. There was no such necessity for the purchase of these charts as would bring the case within the principles of *School District v. Snell*, 24 Mich., 350.

Charts: School director: Unauthorized purchase: Ratification. The purchase of these charts by the director, without instructions from the district board, being unauthorized and void as to the district, his retention of them, and occasionally placing them in the school-house, could not operate as a ratification by the district of his unauthorized purchase.

Submitted on briefs April 12. Decided April 24.

Error to Ingham Circuit.

GIBSON v. SCHOOL DISTRICT NO. 5 OF VEVAY.

This suit was brought by plaintiffs in error in justice's court, where they obtained judgment, and the school district took an appeal to the circuit. The cause in the circuit was tried by the court without a jury and the following special finding filed, viz.:

"This cause was tried before the court without a jury, and the following facts are found and conclusions of law deduced therefrom:

"*First.* That the defendant is a school district duly organized, and was such on the 7th day of March, 1871.

"*Second.* That on that day William M. Williams was director and Henry M. Rutly moderator, and signed and delivered to the payees therein named the following order:

'TOWNSHIP OF VEVAY,
'COUNTY OF INGHAM, STATE OF MICHIGAN, }
'March 7th, 1871.

'MR. ———, *Township Treasurer*:—Please accept, and, on or before the first day of February, 1872, pay Attaway & Barlow, or bearer, the sum of twenty-five dollars, out of the library school fund belonging to school district number five, in said township, with interest at ten per cent. if not paid when due, for a set of 'National Business Multiplication Charts,' purchased and received by us for the use of said district.

'WILLIAM M. WILLIAMS, *Director.*'

'HENRY M. RUTLY, *Moderator.*'

"*Third.* That the plaintiffs purchased and paid for this order about two weeks after it was given.

"*Fourth.* That it was given for the charts referred to in the order, which were received by one of the officers signing the order; that they consisted of a dozen or more charts or cards containing the multiplication table, practical forms of business contracts, and also brief mention of prominent historical events, and were designed for use in school-rooms, but proved to be of no practical use or value as a means of instruction; that they have, ever since the purchase, been retained by the district; that there has been no

GIBSON v. SCHOOL DISTRICT NO. 5 OF VEVAY.

effort on its part to return or re-deliver them to the persons of whom they were purchased, or to any one, and it has been the habit of the director of the district, during a portion of the time since the purchase, to place them in the school-house of the district at the commencement of school term for use, but they have not been found useful for the purpose for which they were designed and purchased—that is, as a means of instruction, and in point of fact were of no value for that purpose.

“*Fifth.* That the order was never presented to the township treasurer for acceptance or payment.

“*Sixth.* That at the time the charts were sold and the order signed, the director and moderator were not together, but the agent of the payees, through whom they transacted the business, visited or called upon them separately, and to each represented that the district had moneys to its credit belonging to the fund upon which the order was drawn; that if it had not, and the order could not in consequence be paid out of such fund, the district should not be called upon to pay for the charts at all.

“Upon these facts the following conclusions of law are deduced:

“*First.* That the order is void, having been drawn upon the township treasurer.

“*Second.* That the purchase and agreement as to the price was not within the authority of the director or moderator with whom the transaction was had, and the plaintiff cannot therefore recover for goods sold and delivered.

“Let the judgment be for the defendant, with costs.”

M. V. & R. A. Montgomery, for plaintiffs in error.

Kilbourne & Clayberg, for defendant in error.

MARSTON, J:

Counsel for the school district claim, and counsel for plaintiffs in error concede, that the order of March 7th, a

GIBSON v. SCHOOL DISTRICT NO. 5 OF VEVAY.

copy of which is set forth in the finding of facts, is void. It is not pretended that the charts in question were purchased pursuant to instructions given by the district board, or that the board at any time after the purchase ratified it. It is claimed that *section 3618* makes it the duty of the director to provide the necessary appendages for the school-house, and keep the same in good condition and repair, and that under this section he could purchase the charts in question. We think that these charts can in no proper sense of the term be considered a necessary appendage within the meaning of this section. If they could be so considered, then it would be difficult to draw the line, and at all limit the power of the director in this direction. Nor do we think that there was any such necessity for the purchase of these charts as would bring the case within the principles of *School District v. Snell*, 24 Mich., 350, as claimed. The fact that these charts have been retained and occasionally placed in the school-house by the director, would not be such a ratification of an unauthorized and void contract as would entitle plaintiffs to recover. The director could not in this way ratify a contract which he was incapable of making in the first instance.—*Township of Taymouth v. Koehler*, 35 Mich., 22.

The judgment must be affirmed, with costs.

The other Justices concurred.

Isaac Haynes v. Roswell Knowles and another.

Jurisdiction: Return: Amendment: Discontinuance. The query is suggested, whether it is competent under any circumstances to amend a return on which jurisdiction over property depends, after the suit has been discontinued.

Return: Amendment: Notice. A return cannot be amended in matters affecting the jurisdiction without notice to the parties to be affected by it.

HAYNES v. KNOWLES.

Officer: Misconduct: Return: Ex parte amendment. An officer who is sued for misconduct in office cannot, pending the trial, manufacture evidence for himself by an *ex parte* amendment of his return covering the official action which is the basis of the suit against him.

Attachment: Levy: Partnership property: Individual interest. There is no room for a presumption that a levy of an attachment running against the goods and chattels of one member of a firm, upon specific partnership property, item by item, the appraisal being made in like manner, is a levy upon the partnership interest only of the defendant in the writ.

Attachment: Partnership property: Individual interest: Specific chattels. A levy on the interest of a partner, if it can be made at all under an attachment, cannot be made on specific chattels. Such a levy is a trespass.

Attachment: Individual interest: Firm property: Joint action. The unlawful levy of an attachment against one member of a firm on specific chattels of the firm is injurious to both partners, and may therefore be the subject of a joint action and give rise to a joint judgment, where the injury is tangible and the property disturbed or destroyed.

Damages: Destruction of business. And damages in such case for the destruction of the business are allowable.

Submitted on briefs April 13. Decided April 24.

Error to Superior Court of Grand Rapids.

Godwin & Reeves and Blair, Stone & Kingsley, for plaintiff in error.

Hughes, O'Brien & Smiley, for defendants in error.

CAMPBELL, J:

Haynes was sued for the conversion of the partnership property of Knowles & Littlefield and for breaking up their business by its seizure and retention without right.

His justification was a levy under a writ of attachment directed against Lon P. Littlefield, under which he made the seizure in question. The plea was the general issue, without any special notice. The property seized was hides, meat, fresh and salt, and a lot of articles used in carrying on a market. The evidence tended and was found by the jury to show a complete ouster of both parties and the entire destruction of their business.

The evidence introduced further showed a levy on all the specific property, item by item, and its appraisal in the same way, on the 10th of April, 1875, under the attachment in question.

HAYNES v. KNOWLES.

The defense controverted some of the facts shown by the plaintiffs, and also undertook to show an amendment made by the sheriff of his own return, under an *ex parte* order of the court issuing the attachment, the averment as amended being, that he levied on "all the interest of Lon P. Littlefield in all the partnership property and goods of the firm of Knowles & Littlefield, a copartnership composed of said defendant and one Roswell Knowles," etc. The original return made no mention of any partnership interest, nor did the appraisal.

This amendment was made and applied for on the same day, December 13, 1876, while the present suit was on trial, and without notice to any one; and the affidavit, which was entitled in the original attachment suit, showed that the suit had been discontinued long before.

The court rightly excluded this testimony. If it is possible under any circumstances to amend a return on which jurisdiction over property depends, after the suit has been discontinued, it certainly cannot be done in any case without notice to the parties to be affected by it.—*Montgomery v. Merrill*, 36 Mich. R., 97. But the idea that a person who is sued for misconduct in office can be allowed, pending his trial, to manufacture *ex parte* evidence for himself, is preposterous. The amendment is inconsistent and legally false, because the appraisal still stands in contradiction of it, showing that the appraisers valued the entire property item by item; and this appraisal, which is required to conform to the levy, was served on the defendant in attachment, with the writ.

We cannot quite understand how the court was induced to hold that under the original return the presumption was that the levy was only made on the partnership interest. But this error was in favor of the present plaintiff in error, and the jury came to the conclusion, nevertheless, that the seizure and ouster from the whole property were fully made out, as we think they were quite right in finding. The property having been burned up, the loss became complete.

HAYNES v. KNOWLES.

Such a levy cannot be justified. A levy on the interest of a partner, as intimated in *Sirrins v. Briggs*, 31 Mich. R., 443, if it can be made at all under an attachment, cannot be made on specific chattels. Such a levy is a trespass. The partner not sued cannot on any principle of justice be placed in any worse condition by a creditor of his partner than he could have been by his own partner. To have partnership business interrupted and broken up by a sheriff's interference on *mesne* process, when it may turn out, as it did in this case, that no final judgment will be rendered against the defendant in attachment, is a result so unjust and destructive of valuable rights, that it does not commend itself. The machinery of our attachment laws, especially concerning appraisements, is not adapted to such seizures. The hopeless confusion in the authorities as to the manner and effect of levies on partnership interests, shows the difficulty of finding any safe rule to govern them, and we are not called upon to attempt it in the present case. It is clear that such a levy as was here made cannot be justified.

The trespass made by an unlawful levy is injurious to both partners, and may therefore be the subject of a joint action, where the injury is tangible and the property disturbed or destroyed. There is no objection, therefore, either to a joint suit, which was not objected to here, nor to a joint judgment, which was objected to. Littlefield was as much damnified as Knowles, as his business was destroyed, and his property was not returned to him when the attachment was dissolved; and we are not concerned with any speculative questions which might have arisen had the levy been regular, and the property preserved.

The damages allowed for the destruction of the business come clearly within the rule in *Chandler v. Allison*, 10 Mich. R., 460; and *Allison v. Chandler*, 11 Mich. R., 542.

The judgment must be affirmed, with costs.

The other Justices concurred.

ROGERS v. ODELL.

James U. Rogers v. Austin C. Odell and others.

Specific performance: Land contract: Certificate: State patent: Fraud. One who held a part paid certificate for state university lands, and which he had mortgaged, having sold to complainant his remaining interest and put him in possession, and then subsequently assigned his certificate to another person who advanced the money to take up the mortgage and to pay the balance due the state and thereupon obtained a state patent, a bill in equity against the original owner, the mortgagee and the subsequent purchaser, for specific performance of complainant's contract and to enjoin ejectment, is sustained.

Contracts: Partial agreements: Written instrument: Evidence. A written contract being set up in the bill and produced in proof, which is complete in itself, it was held that it was not impeached by an averment in the sworn answer that it constituted but part of the entire contract of which the residue was reduced to writing and in complainant's possession, nor by contradictory and unsatisfactory proofs by parol of an agreement not supplementary to the writing produced and proved.

Evidence: Inconsistent action. The failure of the vendor to take any steps to forfeit the contract or to demand further payment or to dispossess the vendee, when if his version of the contract were true there were several installments past due and unpaid, and the acceptance as satisfactory of payments which were much less than is now asserted to have been due at the time, are significant facts tending to discredit his testimony.

Written contracts: Mistake. It requires very strong equities to induce a court to refuse to enforce a written contract, even where a mistake is alleged to have been made in drawing it up.

Heard April 13. Decided April 24.

Appeal in Chancery from Kalamazoo Circuit.

Robert F. Hill and Arthur Brown, for complainant.

May, Buck & Powers, for defendants.

CAMPBELL, J:

Complainant filed his bill to obtain specific performance of a land contract, and to prevent an action of ejectment brought to remove him from the premises in controversy.

The facts are in some respects agreed upon, and in some disputed. The undisputed facts are as follows: Odell owned a state land office certificate for forty acres of uni-

ROGERS v. ODELL.

versity land, on which there was unpaid not far from two hundred and seventy dollars. This was hypothecated or mortgaged to Peter Johnson for a loan of two hundred and fifty dollars and interest.

In the fall of 1870 Odell agreed to sell out his remaining interest in the land to complainant Rogers, and put him in possession, where he has remained ever since. A written agreement was drawn up by one Hawkins, a justice of the peace, under the direction of Odell, and signed by him, and delivered to complainant, dated November 26, 1870. This agreement provides that on the payment of two hundred and fifty dollars, one hundred down, and one hundred and fifty dollars on or before March 23, 1871, with interest at ten per cent., Odell is to transfer to Rogers all his right, title and interest in the land certificate.

Rogers paid down the one hundred dollars, and made small payments at various times until February, 1873, when he completed the payment of one hundred and fifty dollars and interest, and claimed that he had fully complied with his agreement. Odell claims he made no such assertion, but the steps he took immediately thereafter show that this is not so. Notice was at once given to Odell, in writing, demanding compliance.

Odell then made a sale to Mrs. Squires, who advanced the money to pay Johnson and the state, and obtained a state patent. She also advanced some more money to Odell. The answer, which was sworn to, claims that Odell told her Rogers had forfeited his contract. It also claims that she purchased of Odell for twelve hundred dollars. Odell swears she paid down nine hundred and seventy-five dollars, and that the price was twelve hundred and fifty dollars, the balance of which she was to pay when she got possession. Mrs. Squires, in her direct examination, says the price was twelve hundred and fifty dollars. On her cross-examination, she swore she had paid nine hundred dollars down, and was to pay three hundred dollars more when she got possession, and that there were two receipts taken at different times,

ROGERS v. ODELL.

and that there was no agreement as to what should happen if she failed to get possession. The receipts appearing in the record are for five hundred and twenty-five dollars, and two hundred and seventy-five dollars, making eight hundred dollars. The first of these receipts, for five hundred and twenty-five dollars, was dated March 14, 1873, and bound Odell to procure her for that amount the state title and quit possession. The second receipt, purporting to be dated March 28, 1873, acknowledges payment of two hundred and seventy-five dollars to apply on purchase price, "leaving a balance due me, A. C. Odell, the sum of three hundred dollars from Sarah Squires, balance of purchase price of said lands." These receipts are not identified, nor proven, so far as we can learn from the record, although marked as exhibits. Assuming them to be genuine, and to have been given at their dates, they would make the price eleven hundred dollars. In the view we take of the facts, we shall not discuss these apparent discrepancies.

On the 28th of March the attorneys of Mrs. Squires notified Rogers that she had purchased the land and held the patent, and demanded an immediate surrender.

Rogers has paid all the taxes since his purchase, and paid interest to Johnson and to the state, and has made improvements of some value.

No attempt was ever made to forfeit the contract, and there is no evidence of any complaint or demand indicating that he was seriously in default at any time.

The defense, nevertheless, is based on the assertion that when Rogers purchased of Odell the price was fixed at thirteen hundred and fifty dollars, and the answer avers it was payable as follows: two hundred and fifty dollars and interest to Johnson; two hundred and seventy-five dollars and interest to the state; and eight hundred and twenty-five dollars to Odell, of which one hundred dollars was to be paid down, and the balance in annual payments of two hundred and fifty dollars each, with annual interest at ten per cent. This would make the first annual payment due November 26,

ROGERS v. ODELL.

1871, three hundred and thirty-two dollars and fifty cents, and the second, if the first was promptly paid, three hundred and seven dollars and fifty cents, due November 26, 1872.

The answer does not deny the execution of the written contract set up in the bill, but says it was only a part of the contract, and that the remainder was reduced to writing and in possession of complainant. Odell, in his testimony, claims that he understood the paper set up in the bill to contain the entire contract for thirteen hundred dollars, as set up in the answer, and that he would not have signed it unless he had so supposed.

There are statements of various witnesses tending to show that Rogers from time to time stated that he had purchased on the terms alleged by Odell.

The answer was sworn to and does not agree with the testimony. If any other writing was drawn up, it would have been some agreement signed by Rogers and delivered to Odell. And it is impossible that any such writing should have existed which contained matter merely supplementary to such a paper as was shown in the bill. The entire arrangement set up by Odell was contradictory, and not supplementary, to that document.

When Rogers made his payment in February, 1873, the only dispute between him and Odell is as to whether he said it was in full of the contract, as sworn to by himself and a witness Walker, or in full of the first payment. Odell swears that he dropped his voice in saying "on the first payment," and that he suspected a secret understanding with Walker. He appears to insinuate that Walker was meant not to hear this clause so that he might swear to an undenied allegation of full payment. And he says that after Walker had moved out of hearing, Rogers and he had a little further talk as to whether it made up the first payment in full, of which he claims not to have been certain without reference to his books.

If the contract had been as Odell claimed, the first pay-

ROGERS v. ODELL.

ment would have been less than half paid, as it was, with the interest in arrears upon it, in the neighborhood of three hundred and seventy-five dollars, and there would have been due at this time, including the second payment, which was three months in arrears, more than six hundred and seventy-five dollars. Yet all that had been paid, in small sums and in fruit and vegetables, was one hundred and fifty dollars and interest. And no claim is pretended by Odell to have been made at that time, that he required further payments or made complaints about them, or that he supposed the first payment was not substantially discharged.

The proofs show that the paper signed by Odell was deliberately and knowingly signed, and the answer admits it, but claims it was only one of two papers. This theory cannot be maintained so as to be consistent with any of the claims of the defense, as to what the contract really was.

The course of Odell, in attempting to defeat Rogers, as soon as he had completed the payment which the written agreement called for, by hurrying the title into the name of Mrs. Squires, was not such as could have been justified under any circumstances. He made no demand on Rogers for further payments, and gave him no notice to quit, but at once procured Mrs. Squires to obtain the state patent and clear off Johnson's incumbrance, and she thereupon began hostile action to turn out Rogers and deprive him of all his expenditures.

It requires very strong equities to induce a court to refuse to enforce a written contract, even where a mistake is alleged to have been made in drawing it up, which is not pretended in the answer, although averred in the testimony.

We do not think the defense is made out. The testimony is certainly conflicting. But the whole conduct of the parties, and the circumstances of the case, indicate that there are no satisfactory proofs of such equities as should deprive Rogers of his land.

The decree must be affirmed, with costs. As the time

ROGERS v. ODELL.

of payment was interrupted by the appeal, it will be extended to ninety days from the entry of decree in this court, and in default of payment, application may be made to the circuit court for a sale as on mortgage proceedings, to collect the amount.

The other Justices concurred.

The People on the relation of James I. Mead v. The Treasurer of Ingham County.

Superintendents of the poor: Removal from office: Supervisors. The supervisors have no general authority to remove from office at their discretion superintendents of the poor; the statute (*Comp. L. 1871 § 477, Sub. 14*) giving them express authority to remove on the specific grounds of neglect or refusal to report or to give bonds, and no other power of removal being conferred, a general authority to remove will not be implied as a consequence of the power to appoint.

Superintendents of the poor: Removals from office. The general statute concerning removals (*Comp. L. 1871, ch. 11*) contains no provision applicable to superintendents of the poor. Our state system favors appointments for fixed periods and almost entirely rejects the policy of removals at will, and this rule of action appears to have been observed in the regulations concerning superintendents of the poor.

Mandamus: Title to office: Warrants: Officers de facto. On an application for mandamus to require the county treasurer to pay an order drawn by persons claiming to be superintendents of the poor, the legal title of the officers will not be tried; but it appearing on the record that their appointment was unauthorized, mandamus will not be granted unless it appears that notwithstanding the want of title, they have got actual possession and are generally reputed to be such officers, and are hence officers *de facto*.

Officers: Void appointment: Recognition. The supervisors having acted without authority in making the appointment of new officers to fill a supposed vacancy caused by their attempted removal of existing officers, their immediate recognition of the appointment as one to be respected, cannot be regarded as of any importance; they merely attributed validity to their own invalid act.

Officers: Recognition. One of three superintendents having been a party to the controversy out of which resulted the attempted removal by the supervisors of the other two, and the appointment of others in their places, his recognition of the new appointees as his colleagues or co-superintendents, would be of little force to make out that they were officers *de facto*.

MEAD V. TREASURER OF INGHAM COUNTY.

Mandamus: Answer: Officers de facto: Acquiescence. In mandamus cases where the matter is heard on petition and answer, the answer is to be taken as true; and the statement in the answer in this case that the superintendents sought to be illegally removed have retained the files and records of their offices, have constantly denied the right to make the removal, and have continued to act as officers, is conclusive against the claim of the new appointees that they have acted as such officers with general acquiescence in their right.

Heard April 17. Decided April 24.

Application for Mandamus.

S. F. Seager and H. B. Carpenter, for relator.

H. P. Henderson, for respondent.

GRAVES, J:

The board of supervisors of Ingham county, at a special meeting in March last, passed a resolution to remove from office two of the county superintendents of the poor, namely: Messrs. Hayner and Huntington, and to appoint in their place Messrs. Craddock and Williams. Both Hayner and Huntington had some time to serve. The relator was the third superintendent under an appointment made previously, and was not disturbed.

This proceeding by the supervisors was caused by conflicting action concerning the purchase of a poor-house farm for the county, a majority being of the opinion that Messrs. Hayner and Huntington had violated faith with the supervisors in certain transactions connected with the purchase and had attempted a fraud on the county, and it was upon this ground that the resolution was based. It was not founded on the authority contained in subdivision 14 of section 11 of the general act defining the powers and duties of boards of supervisors.—§ 477, *C. L.* They were not complained of for any neglect to report or give bonds, and the resolution failed to receive the vote required by that statute.

Having passed the resolution to oust Hayner and Huntington, and to put Craddock and Williams in their place,

MEAD v. TREASURER OF INGHAM COUNTY.

the supervisors ordered the respondent to pay all orders signed by a majority of the board of superintendents, made up of relator, Craddock and Williams.

A few days afterwards, and on March 19, the relator and Craddock and Williams met, and assuming to be the board of superintendents, united in drawing an order in favor of one Woodworth or bearer for six dollars and forty-four cents on the respondent, and he refused to pay it, on the ground, in substance, that Craddock and Williams were not superintendents, and hence that the order was not sanctioned by a majority.

The relator insists that Craddock and Williams were superintendents, and that the order was well drawn, and he asks that a mandamus may be awarded to compel the respondent to pay the order, it being admitted that he has funds applicable to legal orders.

The counsel for relator have not been able to point out any provision giving express power to the board of supervisors to make the removal attempted in this case, and we have not been able to discover any, and we think the argument in favor of implying the power is not well founded.

The statute fixes the term of the superintendents at three years, and the supervisors are required to appoint for such term.—§ 1817, *C. L.* And under the provision contained in the supervisors' act for making removals the supervisors are empowered to remove on the specific grounds of neglecting or refusing to report or to give bonds.—*Ch. 10, C. L., sub. 14, § 477.*

The general statute concerning removals (*ch. 11, C. L.*) contains no provision applicable to superintendents of the poor. Hence there would seem to be no provision for the removal of these officers except the specific regulation in the supervisors' act. It would therefore seem that the legislature meant to confer on the supervisors a power to remove on the two specified grounds, but had no intention to give the right on any other ground, or to delegate to the supervisors a discretionary general power to remove. The pro-

MEAD v. TREASURER OF INGHAM COUNTY.

vision in the supervisors' act, in so far as it applies to superintendents of the poor, would be rendered entirely gratuitous if a general authority to remove were to be implied or should be considered as a consequence of the power to appoint.

Our state system favors appointments for fixed periods, and almost entirely rejects the policy of removals at will, and this rule of action appears to have been observed in the regulations concerning superintendents.

Considering, as we must, that the supervisors were not empowered to remove Hayner and Huntington for the cause assigned, it follows that the resolution for their removal created no vacancy to be simultaneously filled by the appointment of Craddock and Williams. Their appointment consequently was not a valid one. It may be well to observe here that the respondent's duty to recognize orders made upon him would not necessarily depend on the legal title of the superintendents. The important question on application for mandamus to compel him to pay must be rather upon the actual *status* of the makers of the orders and the attitude of the general public towards them, and the inquiry here concerning the validity of the appointment is not to make the event of the application turn upon the result of that inquiry.

The appointment is considered, not to try the right to office, but because the question is inseparably connected with the question of the position in fact of the appointees.

As we have seen, the appointment was not authorized, and unless it appears that notwithstanding the want of title Craddock and Williams actually got possession and were generally reputed to be superintendents, and hence were officers *de facto*, this application cannot be sustained.

Now, if Hayner and Huntington, who were lawfully in office, have never yielded, but have held on and continued to act, then Craddock and Williams have never got possession and cannot be regarded as officers *de facto*.

The office of superintendent is single, and it is legally impossible that it should be occupied by two at the same

MEAD v. TREASURER OF INGHAM COUNTY.

time. The relator's case in this connection is, that Craddock and Williams qualified, and that the supervisors recognized them at once as lawful officers, and that they assumed to act in the single instance of making the order now in question, and that relator, as third superintendent, with an undisputed title, acted with them on that occasion and so recognized their right.

As the supervisors acted without authority in making the appointment, their immediate recognition of the appointment as one to be respected cannot be regarded as of any importance. They merely attributed validity to their own invalid act. The fact of making the order in question can scarcely be urged as something helping to show authority to make it, and the circumstance that relator joined is of small consequence to show that Craddock and Williams were in and reputed to be officers. He was a party to the controversy which caused the attempted change, and desired that Craddock and Williams should hold. He believed they were entitled and sided with them. This is not mentioned as any thing improper, but as a fact giving color to his acceptance of Craddock and Williams as colleagues or co-superintendents.

As relator he does not claim that those gentlemen actually got possession of the places or were generally reputed to be superintendents.

On the other hand, however, the answer, which for the purpose of this hearing must be taken to be true, explicitly avers that Hayner and Huntington have retained the files and records, and have refused to surrender them to Craddock and Williams, and have constantly denied the right of the supervisors to make the removal, and have continued to act and are now acting as superintendents.

The effect of the statements in the answer is, that Hayner and Huntington have never yielded possession, and that Craddock and Williams have never obtained it, and the effect of the whole showing is, that the latter gentlemen have never been superintendents by general repute, have never been in

MEAD v. TREASURER OF INGHAM COUNTY.

a course of acting as superintendents, with general acquiescence in their right to act so.

It does not appear, therefore, that the facts existed which made it the legal duty of the respondent to pay the order in question, and as a consequence the writ must be denied.

We give no opinion as to the correctness of the action had in regard to purchasing the farm.

The other Justices concurred.

Harrison Halbert v. School Districts Numbered 2, 3, and 5 in the Township of Watertown.

School districts: New districts: Parceling out territory: Joint liability for debts. Where a school-district is parceled out among three other existing districts, the latter cannot be held jointly liable for a debt of the former district; whatever they are bound to pay must be a several, and not a joint obligation.

Submitted on briefs April 18. Decided April 24.

Error to Clinton Circuit.

H. & H. E. Walbridge, for plaintiff in error.

R. Strickland, for defendants in error.

CAMPBELL, J:

Plaintiff sued the three school districts named as defendants, as jointly liable upon a debt of a formerly existing district, number seven, which was extinguished by dividing up its territory among the three named.

Where the territory of a school district is absorbed by other districts, the statute contemplates that the township board of school inspectors shall make an equitable adjust-

HALBERT v. SCHOOL DISTRICTS NUMBERED 2, 3, AND 5,
OF WATERTOWN.

ment of property and debts so as to apportion them fairly among the districts which have succeeded to the jurisdiction of that which has been divided.—*C. L.*, §§ 3644, 3645, 3646. How far this may have been attempted in the present case we are not informed, nor can we now discuss the completeness or efficiency of the statutory proceeding to reach the equities of these parties. The only question before us is, whether a joint action lies against defendants for the debt of the dismembered district.

The court below held there was no such liability. This holding was correct. There is no legal identity or corporate succession between the various bodies, out of which a joint obligation can be made to arise. Where one district is made up out of two entire districts, it is clear enough that it must succeed to their rights and liabilities, because no part of their territory is left out from it, and there is nothing to apportion.—*Brewer v. Palmer*, 13 *Mich. R.*, 104. But where one is parceled out among three other existing districts, the amount which should properly fall to each of them out of the property, and the amount each should bear of the debts, depends partly on the valuation of the taxable property divided, and partly on the location of the school-house, according as it is retained or sold. There is no presumption that they will be on exactly equal footing; and even if this were assumed, there is no law making them jointly interested, or jointly responsible. Whatever they are bound to pay must be a several, and not a joint obligation.

We can find no support for an action like the present. The judgment must be affirmed, with costs.

The other Justices concurred.

MAYNARD v. WOODARD.

David Maynard and another v. David A. Woodard and others.

Wills: Bequest: School district: Library. A bequest to a school district board named, and their successors, in trust to invest at interest and expend the interest annually for purchasing and adding to a school library, such books to be selected as will be suitable for people of all ages and classes in the district, and so used by them under proper rules and regulations as shall best promote the interest of education, general literature and morality, is sustained as a valid bequest.

Wills: Beneficiaries: Managers: Trust: School district board. The intended beneficiaries and the managers are persons known to the law as competent to take and use all property destined for the legitimate uses of school districts, when sufficiently designated and granted.

Libraries: School apparatus: Public school purposes. Libraries must certainly be considered within the proper range of school apparatus, and the design of this bequest cannot be held to be in conflict with public school purposes.

Bequest: Public school library: Charities: Definiteness: Discretion: Intent. The bequest is for a purpose coming within the range of charities, but the doctrines applied to imperfectly defined gifts and trusts are not involved; the property, the trusts, the beneficiaries and the trustees or managers, are all definitely specified; the only discretion involved is that of the lawful administrators of the district, and is a corporate discretion; and there is no room for technical criticism upon the question whether the bequest is to the district or to the board; the intent is not obscure.

Public corporations: Bequests: Acceptance: School district: Library. There is nothing in our laws which cuts off public corporations from accepting benevolent offerings to enable them to extend their usefulness and benefit their people by enlarging their opportunities for culture and refinement without multiplying or increasing their burdens; and a school district may lawfully accept a bequest of a fund to be invested and the interest expended in purchasing and keeping up a district library, and it is legally capable of administering such a trust.

Submitted on briefs April 18. Decided April 24.

Error to Washtenaw Circuit.

Felch & Grant, for plaintiffs in error.

Beakes & Cutcheon, for defendants in error.

CAMPBELL, J:

Lucy M. Maynard, by her last will, directed the residue

MAYNARD v. WOODARD.

of her estate, real and personal, not otherwise disposed of, to be sold and converted into money and applied under the following provisions:

"The effects thereof I give to David A. Woodard, Harmon Allen and Thomas Richards, district board for fractional school district No. 1 in Milan and No. 1 in York, and their successors forever, in trust for the following named purposes: I direct that the funds so placed at the disposal of the said district board shall be placed at interest by them and the interest be annually used for purchasing and adding to a school library, the said library to be selected and cared for by the said district board or their legal representatives. And it is my wish that such books be selected as will be suitable for people of all ages and classes within the said district, and so used by them under proper rules and directions of the said board as shall best promote the interest of education, general literature and morality."

The validity of this bequest is attacked by two of the heirs at law. The circuit court of Washtenaw county, affirming the order of the probate court, held the provisions to be valid; and the conclusions from the facts found were, "that the fair result of the bequest is to constitute the school district referred to, acting through its district board, trustee; and that the residue now remaining in the hands of the executors should be assigned to the persons constituting the district board of said school district, and their successors forever, for the uses and purposes expressed in said will."

From this order, two of the heirs, David and John Maynard, appeal. In order to determine the questions raised by the appeal, it is necessary to consider the legal position of school districts and school boards.

Every school district is a corporation, and the technical corporate name of this district is fractional school district number one in Milan and number one in York.

The district board have custody and care of all the property and moneys of the district (except such as may be confided under certain circumstances to the director), and

MAYNARD v. WOODARD.

are required to apply and pay over all school moneys belonging to the district in accordance with law. Where there are district libraries, these are under the care and management of the district board, whose control is general, and who make selections and purchases, and provide for the safe keeping and use of the books.

It is manifest, therefore, that both the intended beneficiary and the managers are persons known to the law as competent to take and use all property destined for the legitimate uses of school districts, when sufficiently designated and granted.

The object of the will is entirely plain. It proposes to appropriate money to be used and managed permanently for the purposes of a district school library. The books are to be selected by the board for the time being, and the selection is with a view to promote the interests of "education, general literature and morality."

The ordinance of 1787, under which this region was first set apart for its future creation into states, which have been organized under its sanctions, declared that religion, morality and knowledge were necessary to good government, and the happiness of mankind, and provided that for these expressed purposes "schools and the means of education shall forever be encouraged." It is somewhat strange, therefore, to have it suggested that libraries are not within the proper range of school apparatus, or that the purposes set forth in this will are in conflict with public school purposes. When schools cease to be used for such purposes, they will cease to be worthy of support or toleration. Nothing but poverty can make it proper for any school district to deprive itself of the valuable aid of libraries, which enlarge and supplement the work of the teacher, and educate people of all ages as no other instrumentalities can educate them. The bequest in controversy, if invalid, must be so held because of some infirmity in the legal constitution of the district, or of some defect in the declaration of the trust.

MAYNARD v. WOODARD.

The bequest is for a purpose coming within the range of charities, but it is not one which requires any consideration of the doctrines which apply under the English system to imperfectly defined gifts and trusts. The property and the trusts are definite, the beneficiary is definite and the trustees or managers are definite. If no managers were named, the administration of the trust would devolve on those officers who manage district business, and the board designated perform that function. The discretion involved, therefore, is the discretion of the lawful administrators of the district, and is a corporate discretion. There is no room for technical criticism upon the question whether the bequest is to the district or to the board. The intention of the will is not obscure, and the testatrix has directed the money to be paid just as she would have paid it in person had she desired during life to make a gift to the district.

There is really but one question of any importance on the record. That is, whether the corporation is legally capable of administering such a trust, which the appellants claim is not within the statutory powers; and they insist these bodies have none but statutory powers, and cannot go beyond them.

Upon this point the diligence of counsel has collected much learning, but it seems to have been overlooked that the subject has already been disposed of in this court, and we do not care to enlarge upon it.

In *Stuart v. School District No. 1 in Kalamazoo*, 30 Mich. R., 69, there was an examination into the powers of school districts to enlarge and extend their courses of instruction, and it was held the statutes could not be narrowly construed without doing violence to their intent. In *Hatheway v. Sackett*, 32 Mich. R., 97, the contest was over a bequest to a village of fifteen thousand dollars to be used in the erection of a building for a high school. The objection was made there which is made here, that the purpose was foreign to the objects of the corporation. It was held, however, not to be repugnant, on the ground that

MAYNARD V. WOODARD.

education was a recognized factor in all civilization, and that schools were as important instruments of public advancement as municipal institutions, and neither foreign nor incongruous elements in municipal affairs.

Whether school districts could, without statutory authority, raise money for any library not meant for the purposes of the schools, is a very different question from whether a district library, if obtained without taxation, would be foreign to the educational interests of the district. We are not disposed to regard the present library law as having any especial bearing on this matter. The argument which in the absence of such a law would exclude a library, would, possibly, stand in the way of keeping up any library not in all things patterned after the statute, and supported in the same way. But we have no hesitation in holding, in accordance with the previous decision, that there is nothing in our laws which cuts off public corporations from accepting benevolent offerings to enable them to extend their usefulness and benefit their people, by enlarging their opportunities for culture and refinement, without multiplying or increasing their burdens. We do not hold that they may not reject such gifts if they have not intelligence enough to appreciate them. But we think the acceptance of such a bequest as this by a school district is in the direct line of corporate authority.

The judgment of the court below must be affirmed, with costs of both courts, and the order be remitted for further proceedings.

The other Justices concurred.

MORGAN v. CHICAGO & N. E. R. R. CO.

Henry Morgan v. The Chicago & Northeastern
Railroad Company.

Condemning lands for railroad purposes: Probate court: Jurisdiction: Notice.
The jurisdiction of the probate court in proceedings to condemn lands for railroad purposes, is dependent upon proof of a valid notice to the land owners, and notice mailed to a party whose residence was in fact, and was so alleged in the petition, at Aurora, New York, directed to him at Batavia, Cayuga county, New York, is void.

Submitted on briefs April 18. Decided April 24.

Certiorari to Probate Court of Ingham County.

S. S. Olds, for plaintiff in *certiorari*.

S. L. Kilbourne, for defendant in *certiorari*.

CAMPBELL, J:

This is a *certiorari* to review proceedings condemning lands for a railway. The proceedings were had in the probate court for Ingham county, under a petition presented on the 8th day of November, 1876. The commissioners met and acted on the 11th of November, no one being present representing the plaintiff, and awarded him one dollar for a strip of land one hundred feet wide, extending across a quarter section of land. The affidavit for *certiorari* shows facts which, if true, indicate that the proceedings were intentionally concealed from the resident agent of the land owner.

The statute requires that if the company has not been able to acquire title the reason of the inability must be set out in the petition to the probate court, which must also show the residence of the parties interested, if known or ascertainable with reasonable diligence. It provides that notice of the proposed presentation of the petition may be served personally on an agent residing in this state, or on

MORGAN v. CHICAGO & N. E. R. R. CO.

the non-resident owner of land personally, wherever he may be, or by publication in a newspaper for six weeks, and by sending to the land owner by mail, if known and non-resident, if his residence is known, a copy of the petition and notice of hearing, thirty days before the time of presentation.—*L. 1873, pp. 511, 512.*

The petition shows that the inability to get title arose from non-agreement upon terms. It is silent upon the point of the existence of a resident agent, but it mentions plaintiff's residence as at Aurora, New York, where it was in fact.

Notice was mailed to plaintiff, directed to him at Batavia, Cayuga county, New York.

Without considering the other serious questions presented, this notice was not sent to the proper direction, and was therefore void. As the jurisdiction of the probate court could not attach without proof of a valid notice, the whole proceedings were void, and must be quashed, with costs.

The other Justices concurred.

Alfred J. Buchoz v. Joseph Pray.

Estates of deceased persons: Commissioners on claims: Contingent claims: Appeal: Remedy. The duty of commissioners on claims in the probate court to report the proof of a contingent claim presented to them, is not judicial, but ministerial, and its omission cannot be remedied, rectified or redressed by appeal; its observance must be enforced by warrant (*Comp. L. 1871, § 6300*), or by *mandamus*, or by attachment, or the proof must be supplied, if necessary, in some special way.

Commissioners on claims: Appeals: Statutes construed. The right of appeal from claim commissioners to the circuit court, is given and governed by *chapter 168, Comp. L.*, and not by *chapter 177*, which contains provisions about appeals from certain rulings and decisions of the judge of probate.

Commissioners on claims: Contingent claims: Appeals. An appeal from commissioners to the circuit court does not lie in case of contingent claims not asserted or capable of being asserted as absolute.

BUCHOZ v. PRAY.

Commissioners on claims: Contingent claims: Hear and report proofs. The commissioners have no power to adjudicate upon contingent claims; their duty in regard to them is to hear the proofs and report the same to the probate court (*Comp. L. 1871, § 4464*) to the end that that tribunal, having the facts before it, may require the representatives to retain assets against the possibility of their being needed upon the claim (§ 4465), and provision is made for a hearing and adjudication upon the claim afterwards when it shall have become absolute (§ 4466), and from its allowance or disallowance then, an appeal is provided for.

Submitted on briefs April 18. Decided April 24.

Error to Washtenaw Circuit.

A. J. Sawyer, for plaintiff in error, to the point that an appeal would not lie from the action of claim commissioners upon contingent claims, cited: 1 *Mich.*, 193; 3 *Mich.*, 163; 20 *Mich.*, 366; 3 *Mass.*, 309; 5 *Mass.*, 514; 5 *Johns.*, 174; 3 *Wend.*, 494; 4 *Hill*, 207; 8 *Fost.*, 520; and that *mandamus* was the proper remedy to compel them, if they refused to perform their duty: *Moses on Mand.*, 14; 23 *Wend.*, 455; 35 *Barb.*, 406; 24 *N. Y.*, 114; 11 *Abbott Pr.*, 17; 37 *Barb.*, 466.

Beakes & Outcheon, for defendant in error, cited: *Clark v. Davis*, 32 *Mich.*, 159.

GRAVES, J:

Judge Ninde, Conrad Krapf and Asher A. Terry, having been appointed under *ch. 158, C. L.*, commissioners on claims against the estate of Louis R. Buchoz, deceased, Joseph Pray presented a contingent claim he held against the estate, together with his proof thereof.

February 25th, 1876, the commissioners made their report to the probate court and therein set down the presentation of the contingent claim by Pray and that it was disallowed. The report neither contained nor was technically accompanied by the proof made on the claim. At the same time, however, a full and perfect report was prepared on the subject and filed in the probate court on the 29th of March; but this was only signed by Judge Ninde, the other commissioners not joining in it. On the day this last paper was filed, Pray entered in the court of probate a claim of appeal

BUCHOZ v. PRAY.

from the decision of the commissioners disallowing his contingent claim, and on account of the failure to state in the report the proof adduced before them on such claim.

The circuit judge proceeded to hear the matter without a jury, and at length made a special finding and reversed the determination of the commissioners and awarded a conditional judgment in Pray's favor in dollars and cents.

The administrator then brought error and the return to the writ contains, with the other proceedings, a bill of exceptions, and also exceptions taken to the law findings. An examination of the statutes and the record compels an opinion that the proceedings for the most part have been taken and carried on under a misconception of the purpose and effect of the provisions which relate to the subject.

First, The failure of the commissioners to state in their joint report to the probate court the proof adduced upon the claim, if of any special importance after the separate report of Judge Ninde, was not, as a consequence of its intrinsic nature, the subject of appeal to the circuit court.

The duty to report the proof is not judicial, but ministerial, and its omission cannot be remedied, rectified or redressed by appeal. Its observance must be enforced by warrant (§ 5200, C. L.), or by mandamus, or attachment, or the proof must be supplied, if necessary, in some special way. The judge of probate, on entertaining the claim of appeal, refused to notice this ground, but the circuit judge seems to have considered it as before him.

Second, The right of appeal from claim commissioners to the circuit court is given and governed by *ch. 158, C. L.*, and not by *ch. 177*, which contains provisions about appeals from certain rulings and decisions of the judge of probate.

And as the question is not only involved, but expressly made, it is necessary to see whether *ch. 158* assumes to give any right of appeal from commissioners to the circuit court in case of contingent claims, not asserted or capable

BUCHOZ v. PRAY.

of being asserted as absolute. If it does not, it follows that the proceedings in the circuit court were unwarranted.

Now, the language of the chapter, wherever it relates to demands to be adjudicated before the commissioners, is uniform and distinct. The power and duty of the commissioners over non-contingent claims are referred to in clear and unvaried terms.

Such claims are always to be allowed or disallowed, wholly or in part. They are to be adjudicated upon, and an allowance, in the obvious sense of the statute, is a determination that so much is actually owing, and not that there is a possibility of future indebtedness.—§§ 4428, 4430, 4431, 4433, 4434, 4435, 4438, 4441, 4443, 4444, 4446, 4447, 4449, *C. L.*

The right of appeal is not extended beyond cases in which the commissioners are required to allow or disallow. On the contrary, it is strictly confined to such cases.—§§ 4439, 4440, 4441, 4443, 4444, 4446, 4447, 4449, *C. L.*

When we leave the provisions concerning absolute claims, and which are subject to adjudication, and pass to the procedure in regard to claims remaining contingent, we notice at once a very natural distinction.

The language is no longer that the commissioners shall allow or disallow. Such action is felt to be utterly inappropriate. No power to adjudicate is given to the commissioners. They can neither allow nor disallow. The definition of the claim is express. It is one, in the language of the statute itself, "which cannot be proved as a debt before the commissioners, or allowed by them."—§ 4464.

It may be presented with the proper proof, and in case it is, the commissioners are required, not to allow or disallow it, wholly or in part, but to state the presentation of the claim and the proof relating to it, in their report to the probate court.—*Id.* The purpose to be subserved is pointed out. That tribunal, having the facts before it, may require the representatives to retain assets against the possi-

BUCHOZ v. PRAY.

bility of their being needed upon the claim.—§ 4465. But no hearing for allowance or disallowance is authorized until the claim comes up as absolute, and at that time a hearing is authorized and contemplated.

Whether allowance or disallowance shall take place, cannot be settled at any earlier hearing.

The utter inappropriateness of any action by commissioners by way of allowing or disallowing possibilities, or by way of allowing claims against an estate contingently, is very clearly explained by *Judge Ellsworth* in *Bacon v. Thorp*, 27 Conn., 251.

The statute is consistent. It confers no power on commissioners to make allowance or disallowance in such cases, and gives no right of appeal against such action. The statement of disallowance in the report was void upon its face, and as the matter was not appealable, the court below assumed authority without warrant.

The proceedings in the circuit court should be set aside, with costs, and the cause must be remanded to the probate court, to the end that such action may be there taken in regard to the claim as justice may require.

The other Justices concurred.

 Delamere Brown v. Michael McHugh.

Promissory notes: Defense: Prohibitory liquor law: Finding of facts. In an action upon a promissory note to which the only defense was that it was void under the prohibitory liquor law, a finding of facts which states simply with reference to this defense, that the payee was a grocer and that four dollars of the consideration of the note was for intoxicating liquors which the maker got at the payee's store, is not sufficiently specific and definite to support a judgment that the note was void.

Finding of facts: Judgment: Conjecture: Illegality: Presumptions. The judgment must find its support in the actual state of facts ascertained

86 MICH.—15.

BROWN v. MCHUGH.

and reported; and no aid can be derived from facts not embodied in the finding, nor can facts of equivocal import be reduced to certainty by conjecture, or a ground of illegality be presumed.

Finding of facts: Intoxicating liquor. If the intoxicating liquor mentioned in the finding in this case was native wine or beer, and was sold in lawful quantities, the charge for it was not unlawful, and the note was not tainted by it; and there are no facts found to show that the liquor belonged to the forbidden class, and was not of the sort tolerated by the statute.

Submitted on briefs April 18. Decided April 24.

Error to St. Clair Circuit.

Chadwick & Voorheis, for plaintiff in error.

J. L. Coe and *W. T. Mitchell*, for defendant in error.

GRAVES, J :

On the 14th of July, 1873, McHugh gave his note to one Ryan for one hundred dollars payable six months after date with interest at ten per cent. A mortgage was given upon a span of horses to secure the note. October 20, 1874, the note and mortgage were transferred by Ryan to Brown, the plaintiff. He was not aware that there was any defense to the note, and he paid full value for it. Soon after he bought it he commenced this suit to recover the amount.

The court tried the case without a jury, and the only obstacle to a recovery by Brown was the defense that the note was void under the liquor law in force at the time it was given. The facts reported by the judge on this subject were, that Ryan was a grocer, and that four dollars of the consideration of the note was for "intoxicating liquors" which McHugh had got at Ryan's store. On the strength of this fact, and this alone, the court found, as a conclusion of law, that the note was void.

This finding of fact was not sufficient to sanction the defense and lead to the conclusion of law stated by the court. Whether the court might not have gone further and found all the conditions of fact requisite to show upon the face of the record that the item of four dollars was illegal

BROWN v. MCHUGH.

consideration under the liquor law, is not a question to be investigated here. The judgment must find its support in the actual state of facts ascertained and reported by the judge, or fail. No aid can be derived from facts not embodied in the finding; nor can facts of equivocal import be reduced to certainty by conjecture, or a ground of illegality be presumed. The finding should afford the means for its own interpretation and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment due. Any clause equally open to two meanings, where one would import or indicate lawful conduct or action, and the other unlawful, should be received in the former sense. Now whether the item of four dollars carried into the note sued on was illegal under the liquor law or not, depended on the character of the liquor. If the "intoxicating liquor" mentioned in the finding was native wine or beer, as permitted under § 19 of the liquor law, and was sold in lawful quantities and as prescribed in that section, then the charge for it was not unlawful and the note was not tainted by it. And there are no facts to show that the liquor belonged to the forbidden class, and was not of the sort tolerated by the provision cited. It is therefore seen that the finding is lacking in facts to maintain the defense of illegality in consideration, and that the judgment given for the defendant upon the assumption of sufficient facts to make the defense good, is not sustained by the finding.

The judgment should be reversed, and one entered here in favor of plaintiff in error for one hundred and thirty-seven dollars and seventy-eight cents, and costs of both courts.

The other Justices concurred.

KANE v. CLOUGH.

Edward E. Kane and another v. James E. Clough and others.

Assignment: Mere possibility: Future wages: Existing employment. A mere possibility is not the subject of assignment; but the assignment of wages to be earned in the future under an existing employment is valid, the possibility of future earnings in such case being coupled with an interest.

Assignment: Demands not in existence: Agreement: Remedy in equity. An assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence; and the assignee of future wages would have a right in equity, when the wages were earned, to protect his interest to the extent to which they were earned.

Garnishee proceedings: Naked legal title: Equitable title in another. The query is suggested, whether under the garnishee laws it was the intention to permit the creditor to reach demands to which the debtor had no equitable right, though retaining the legal title.

Employment: Future wages: Piecework: Assignment: Wages earned in continuous employment. The fact that the employment the future wages of which were assigned was piecework, it being at the time the expectation of all parties concerned that the employment would be continuous, would not detract from the validity of the assignment, at least so far as concerns wages afterwards actually earned by the continuation of such employment.

Submitted on briefs April 18. Decided April 24.

Error to Wayne Circuit.

Edward E. Kane, in person, for plaintiffs in error.

The assignment by the principal defendant to his mother did not pass to the latter the title to any of his earnings which accrued subsequent to its date. Defendant at its date was not, in the correct legal meaning of the term, in the employ of the garnishees; he was engaged in an independent vocation of his own, tuning reed organs, for which he was paid by the piece, and which he carried on at some place apart from the factory of the garnishees; he worked when and as much or as little as he pleased, and his time was his own, and not the company's. But the naked fact of employment, at most, is all there is in the case; there was no actual existing contract or engagement between the parties in reference to it. The employment was terminable at the pleasure of either party to it. There was then no certainty, but only a mere chance or possibility that wages would be earned after the

KANE v. CLOUGH.

assignment. Thereafter accruing wages had no potential existence; by which is meant an existence within and through some other property of the assignor, from which in due course of nature they would be evolved: *Benjamin on Sales*, § 78; *Low v. Pew*, 108 Mass., 350; *Van Hoozer v. Corey*, 34 Barb., 12. The assignor had no right *in esse* to the work which the employers might possibly give him, out of which the wages earned after the assignment grew. The assignment was intended in fact to be a transfer of a mere possibility or contingency, not coupled with an interest, nor growing out of property. Such assignments pass to the assignee no title to the subject matter: *Jones v. Roe*, 3 Durn. & E., 93; *Shepard's Touchstone*, 331; *Bell v. Hogan*, 1 Stew. (Ala.), 542; 2 Kent Com., 468, and note e; *Low v. Pew*, *supra*; *Vasse v. Comegys*, 4 Wash., 573. Where at the date of the assignment there is no contract existing with reference to the employment or services under which a subsequent indebtedness is likely to accrue, moneys subsequently earned do not pass to the assignee: *Mulhall v. Quinn*, 1 Gray, 107; *Brackett v. Blake*, 7 Metc., 339; *Cut's Admr. v. Perkins*, 12 Mass., 212; *Farnsworth v. Jackson*, 32 Me., 423; *Hartley v. Tapley*, 2 Gray, 566; *Stewart v. Kirkland*, 19 Ala., 163. The following cases decide that such an assignment as the one under consideration here would not at law pass the title to money subsequently earned, but that it would be enforceable in equity after the accruing of the earnings: *Stover v. Eychschimer*, 3 Keyes, 622; *Field v. Mayor of N. Y.*, 2 Seld., 186; *Mitchell v. Winslow*, 2 Story, 638. The following are exactly in point and sustain our position: *Purcell's Admr. v. Mather*, 35 Ala., 573; *Munsell v. Lewis*, 5 Hill, 639, 8. C., 2 Dento, 226; *Robinson v. McDonnell*, 5 M. & S., 236; *Mulhall v. Quinn*, and *Farnsworth v. Jackson*, *supra*.

A. H. Wilkinson and Hoyt Post, for defendants in error.

The only real question to be considered is the one raised by the fourth assignment of error. This question is, whether one under employment to do piecework, but for no definite term of service, can by instrument in writing assign his wages thereafter to be earned so as to vest the title to such future earnings in the assignee, and put them beyond the reach of the assignor's creditors through garnishee process. Though it is held a person unemployed and under no contract cannot assign his future earnings: *Mulhall v. Quinn*, 1 Gray, 105; yet one under a present contract to perform services, though the contract be indefinite as to time and amount, may assign his future earnings under such contract: *Brackett v. Blake*, 7 Metc.,

KANE v. CLOUGH.

335; *Weed v. Jewett*, 2 Met., 608; *Emery v. Lawrence*, 8 Cush., 151; *Hartley v. Tapley*, 2 Gray, 565; *Taylor v. Lynch*, 5 Gray, 49; *Lannan v. Smith*, 7 Gray, 150; *Wallace v. Walter Heywood Chair Co.*, 16 Gray, 209; *Baylen v. Leonard*, 2 Allen, 407; *Darling v. Andrews*, 9 Allen, 106; *State Bank v. Hastings*, 15 Wis., 75; *Thayer v. Kelley*, 28 Vt., 19; *Augur v. N. Y. Belling & Packing Co.*, 39 Conn., 536; *Garland v. Harrington*, 51 N. H., 409.

The case in 7 Met. was that of a city officer chosen for a year, but subject to removal at the will of the mayor and aldermen.

In 2 Gray, the wages assigned were those of a workman who was paid by the piece.

In 5 Gray, in 7 Gray, and in 51 N. H., the employment was by the day, for no stipulated period.

In 16 Gray, the assignment was held to cover wages earned under a new engagement, at a lower rate, entered into immediately after the expiration of the first.

In 2 Allen, the employment was for an indefinite time, and the assignment was held to have transferred future earnings, though the rate of wages had in the meantime been increased.

The case in 15 Wis. was that of a judge's salary.

The employment in 28 Vt. was by the day, for no stipulated period, and was determinable at any time by either party.

In 39 Conn., the contract of employment was an implied one, to do work generally, for an indefinite time.

The interest of the assignor in such cases is held to be, not a mere expectancy, but a possibility coupled with an interest.

No formal acceptance or assent by the employer is required, but it is enough if he have notice of the assignment: 51 N. H., 409.

COOLEY, CH. J:

This is a suit by garnishee process to recover of defendants a sum owing by them to one Tucker, of whom the plaintiffs are judgment creditors. The garnishee process was served December 9, 1875. On the 16th of October, 1874, Tucker was employed by the defendants doing piece-work in the manufacture of organs, but without any definite contract for the continuance of the employment. Being then indebted to his mother for money loaned, he executed to her an assignment of all the wages that might thereafter

KANE v. CLOUGH.

become due to him from the defendants. Between that date and December 9th following, sixty-five dollars and fifty cents had become due to him, which was less than he was then owing to his mother. It is this sum which is now in dispute; the plaintiffs claiming that the assignment could not reach it, because the moneys were not earned when the assignment was made, and there was no subsisting contract under which they were to be earned.

It has often been decided that a mere possibility is not the subject of assignment. A contingent claim against a foreign country to damages to be recovered by treaty is an illustration.—*Vasse v. Comegys*, 4 Wash. C. C., 570. A sale of fish thereafter to be caught passes no title when they are caught.—*Low v. Pew*, 108 Mass., 347. The same is held of a sale of sums to be earned by a physician in specified future years.—*Skipper v. Stokes*, 42 Ala., 255; and see *Purcell v. Mather*, 35 Ala., 570. In Massachusetts an assignment of future services, there being no existing contract of service, has been held invalid; but cases are cited in the same state which hold that if the assignor is at the time under a contract of service, it is maintainable.—*Mulhall v. Quinn*, 1 Gray, 105; see also *Hartley v. Tapley*, 2 Gray, 565. An officer may assign his salary, though removable at any time.—*Brackett v. Blake*, 7 Met., 335. In Pennsylvania an assignment which professes to transfer a debt to arise for wages not yet earned, against any one by whom the assignor may thereafter be employed, is held to be ineffectual even after the wages are earned.—*Jermyn v. Moffitt*, 75 Penn. St., 399. In New Hampshire it is decided that wages to become due may be effectually assigned, provided there is at the time an existing contract under which they are to be earned.—*Garland v. Harrington*, 51 N. H., 409. The like conclusion is reached in Connecticut.—*Hawley v. Bristol*, 39 Conn., 26; *Augur v. N. Y., etc., Co.*, 39 Conn., 536. The distinction between the cases in which the wages are not earned under a contract existing at the time of the assignment and those in which

KANE v. CLOUGH.

they are, is said to be that "in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right."—*Low v. Pew*, 108 Mass., 347, 350.

But an assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence.—*Field v. New York*, 6 N. Y., 179; *Mitchell v. Winslow*, 2 Story C. C., 630, 638. And in this case the assignee would have had a plain right, we think, to protect her interest under the assignment to the extent to which the wages were earned, if the sum had been sufficient to give the court of chancery jurisdiction. And it is worthy of consideration whether, under the garnishee laws, it was the intention to permit the creditor to reach demands to which the debtor had no equitable right, even though his legal title had not been parted with, or to force the equitable owner into a suit in equity for the protection of his rights.

But we are inclined to think this case ought not to be distinguished from those in which the wages were earned under a continuous contract. The defendant was employed at the time the assignment was made. It is true he might never have received more work, but the expectation of continuous work existed on the part of employer and employed. The proposed transfer had reference to wages to be earned in an existing employment, and in this it differed from that in *Mulhall v. Quinn*, *supra*, where the defendant only performed jobs occasionally. It differs still more decidedly from those cases in which no particular employment was in view in making the assignment. We do not see why a continuous employment at piecework should differ from any other continuous employment, if in the latter the right to discharge at will exists. The substantial difference in the two cases is not in the continuance of employment or in

KANE v. CLOUGH.

the expectation thereof, but in the manner of determining the compensation. Future wages no more exist potentially in the one case than in the other.

The judgment must be affirmed, with costs.

The other Justices concurred.

George Gano v. Salmon F. Heath.

Finding of facts: Supported by evidence: Weight of evidence. On the question whether a finding of facts is supported by the evidence, the conclusion of the judge is not to be set aside because in the opinion of the court of review he has erred in his judgment on the facts, provided there was some evidence to support it; the weight of the evidence is not to be reconsidered.

Promissory notes: Joint makers: Extension: Additional name: Surety. Where one of two joint makers of a promissory note obtains of the payee an extension of the time of payment and procures an additional name to the note, this will not release the other maker, though as between the makers the latter claims to be surety only, the payee having no notice of any such relation.

Submitted on briefs April 18. Decided April 24.

Error to Berrien Circuit.

Potter & Potter and E. Bacon, for plaintiff in error.

N. A. Hamilton and O. W. Coolidge, for defendant in error.

COOLEY, CH. J:

The plaintiff in error was defendant in the court below, and the case comes to this court on a finding of facts, of which the following is a copy:

"The action is brought upon a promissory note of one thousand dollars, signed by Curtis Boughton, George Gano and J. C. Boughton, dated November 20, 1870, and payable with interest at ten per cent. at one year.

GANO v. HEATH.

"The defense set up by Gano was, that he signed the note as surety for C. Boughton, and that when the note became due, Heath, for a valid consideration, extended the time of payment one year, without the knowledge or consent of Gano.

"From the evidence I find the following facts:

"1. On the 5th day of August, A. D. 1870, the defendant and Curtis Boughton purchased a valuable farm lying in this county, at a foreclosure sale made by one Hull under a mortgage from one Stevens to him, and received a commissioner's deed therefor. By an arrangement with Hull, C. Boughton and George Gano became jointly obligated to pay to Hull thirteen thousand dollars on the 20th day of November of the same year upon such purchase.

"2. On the 19th day of said November, C. Boughton applied to one Ormsbee to borrow one thousand dollars for one year. Ormsbee informed him that Heath, the plaintiff, had the money to loan. At C. Boughton's request, Ormsbee drew the note in suit and Boughton took the same to Gano and Gano signed the same with Boughton. It was the understanding between Gano and Boughton, when they purchased said farm, that each should pay one-half of the amount of the purchase, which was about thirty thousand dollars.

"3. When Gano signed the note, he handed Boughton some money and gave him orders upon some persons for amounts to make out one-half of the thirteen thousand dollars going to Hull; he knew that Boughton was getting the one thousand dollars to pay Hull upon the joint debt of him and Boughton. Boughton took the note to Ormsbee and received the one thousand dollars of him of the money of Heath, and went and paid the thirteen thousand dollars to Hull.

"4. It does not appear that Ormsbee had any agency in the matter, further than to receive the money of Heath and to deliver it to Boughton. He knew that the money

GANO v. HEATH.

was to be paid to Hull upon the said obligation of Boughton and Gano to Hull.

"5. On the day this note became due, Boughton requested Heath to extend the time of the payment of this note for one year, and for so doing, agreed to pay to him fifteen per cent. interest and to have his brother, J. C. Boughton, sign the note. With this Heath was satisfied, and Boughton paid the annual interest upon the note, and paid five per cent thereon in advance for one year, and J. C. Boughton signed the note. Of this, Gano had no knowledge.

"6. Heath had no knowledge or information that Gano claimed to be merely surety upon the note, until about the time of the commencement of this suit. He supposed that in fact Boughton and Gano had jointly borrowed the one thousand dollars.

"My conclusions of law are as follows:

"1. The signing of the note by J. C. Boughton had no effect to release Gano from his liability thereon.

"2. The extension of the time of payment of the note by Heath did not exonerate Gano from his liability to pay the same.

"3. The defendant Gano is indebted upon the note for principal and interest in the sum of ———.

"4. C. Boughton and Gano were joint makers of the note, and Gano, as between the makers and Heath, was not a surety of C. Boughton."

A number of exceptions were taken to the finding, as not being justified by the evidence, but a careful reading of the record does not bring us to the conclusion that any one is well taken. On some points different minds might reach different conclusions, but the conclusion of a judge, no more than the conclusion of a jury, is to be set aside because he has erred in his judgment on the facts, provided there was some evidence to support it.—*Lovell v. Willard*, 28 Mich., 346; *Burk v. Webb*, 32 Mich., 173; *Todd v. Davis*, 32 Mich., 160.

GANO v. HEATH.

That plaintiff in error was not released from his contract by obtaining an additional name to it, is decided by *Miller v. Finley*, 26 Mich., 249.

The judgment must be affirmed, with costs.

The other Justices concurred.

David Crapo v. Gotlob Seybold.

Sales: Growing wheat: Payment in oats: Credit. It is competent for parties to contract to make a present sale, with possession, of a growing crop of wheat, payment therefor to be made at a future day in oats instead of money; and such a contract when made would be binding and would pass the title to the wheat, precisely as if the future payment were to be in money.

Replevin: Undivided interest: Wheat in shocks. In an action of replevin for an undivided interest in a crop of wheat standing in shocks, the defendant, having no interest in the other undivided half, cannot raise the point that the wheat being undivided when the writ issued, the action could not be maintained.

Submitted on briefs April 18. Decided April 24.

Error to Ionia Circuit.

This was replevin for some wheat which the plaintiff, Seybold, claimed by virtue of a purchase of an interest in the growing crop, to be paid for in oats to be delivered at a future time. The suit was originally brought in justice's court, where judgment passed for defendant, and the plaintiff appealed. In the circuit the plaintiff had judgment, and defendant brought error and the judgment was reversed and a new trial ordered: see 35 Mich., 169. On the new trial plaintiff again recovered, and defendant has again brought error.

W. O. Webster, for plaintiff in error.

Smith & Sessions, for defendant in error.

MARSTON, J:

This case was before us and decided at the October term (35 Mich., 169), when we held the contract was an executory one, and that the title to the oats and wheat had not passed. A new trial having been ordered, was had and proceeded upon the theory that the parties at the time of their agreement did not intend that the title to any particular one hundred bushels of oats should then pass, but that the oats should be delivered at some future time when demanded, but that the title to the wheat should and did then pass, and that such possession as could be given of growing wheat was given at that time: in other words, that there was a present sale of the wheat and possession given, payment therefor to be made, not in money, but oats at a future day. The case was submitted to the jury upon this theory, and they found in favor of the plaintiff below. There can be no doubt but that the parties had a right to make such a contract, and that when made it would be binding. The wheat could have been sold for money payable in the future, and it could in the same way have been made payable in oats, or any other commodity the parties chose to agree upon, and time could as well be given for the delivery of the oats, as for the payment of the money.

It is also claimed that the wheat being in shocks, and not divided at the time the writ of replevin was issued, such an action could not be sustained. The defendant in that suit did not have or claim any interest in the other undivided half of the wheat, and we do not see how he has any right to raise this question.

We discover no error. The judgment must be affirmed, with costs.

The other Justices concurred.

JUNE TERM, 1877.

The People on the relation of The Attorney General v. Henry H. Bradley.

Legislative authority: Boundaries of representative districts: Supervisors. The legislature has authority, except as prohibited by the restrictions of the constitution (Art. IV., § 4), to change the boundaries of representative districts, and this power is not lodged exclusively with the supervisors.

Representative districts: Change of boundaries: Constitutional restriction: New enumeration. The constitutional requirement that each apportionment and the division into representative districts, etc., shall remain unaltered until the return of another enumeration (Art. IV., § 4), does not preclude the legislature, at its first session after a new enumeration, from enlarging the boundaries of a city so as to take in territory before belonging to another representative district, though the new apportionment has not yet been actually made.

Constitutional law: Titles of statutes: Defining boundaries: Cities. It is competent in an act the title of which expresses the idea of defining and making distinct the boundaries of a city, to provide for enlarging and extending the city limits so as to take in new territory; the word "define," as applied to territorial limits, in its broadest sense, means something more than to determine boundaries already established; and the constitutional limitation, requiring the object of the law to be expressed in the title, was not designed to confine the legislature to the use of words in their most restricted sense in the titles of acts.

Heard April 4 and 5. Decided June 6.

Information in the nature of a Quo Warranto.

S. M. Porter, D. P. Foote and B. Hanchett, for relator.

B. M. Thompson and T. E. Tarsney, for respondent.

MARSTON, J:

The attorney general filed an information against the respondent, charging him with intruding into, usurping and wrongfully holding and exercising the office of alderman of the eighth ward in the city of East Saginaw.

PEOPLE V. BRADLEY.

That the respondent was in fact elected, and that he qualified and entered upon the discharge of his official duties, is admitted. The real controversy grows out of certain legislation annexing South Saginaw with the city of East Saginaw, and it is claimed and set forth that all such legislation was and is in conflict with § 4, *Art. IV.* of the constitution, in that it attempted to transfer a portion of the third representative district of the county of Saginaw into the second.

The respondent in his plea to the information sets forth, that an enumeration of the inhabitants of the state was regularly made in the year 1874, and an apportionment of representatives was made by the legislature in the year 1875, by which apportionment the county of Saginaw was entitled to three representatives; that in the month of October, 1875, the board of supervisors of the county of Saginaw divided said county anew into representative districts; that by such division the city of East Saginaw was constituted the second, which division included the eighth ward of said city in said second district, and that on the 3d day of April, 1876, the respondent was elected, etc. These facts were admitted by a demurrer to the plea.

We need not specifically examine nor pass upon the constitutionality of the several acts of the legislature annexing South Saginaw to East Saginaw, and which it is claimed were unconstitutional within the ruling made in *Attorney General v. Holihan*, 29 Mich., 116. While under those acts the disputed territory was in fact within the corporate limits of the latter city, a new enumeration of the inhabitants of the state was made in 1874, and the legislature at its first session thereafter apportioned anew the representatives among the counties, in accordance with § 4 of the constitution, already referred to. At the same session of the legislature an act was passed entitled "An act to define the boundaries of the city of East Saginaw and the several wards and election districts thereof." This act was ordered to take immediate effect, and was approved April 22, 1875.

PEOPLE v. BRADLEY.

It provided that the boundaries should be and remain as the same had been established by act number 255 of the second volume of the laws of 1873, and that the city should be divided into eight wards, and that the boundaries thereof should continue and remain as particularly described in section two of said last named act. Passing for the present the objection urged against the validity of the act of April 22, 1875, viz.: that the title does not correctly indicate the purpose of the law, we will notice some of the other objections presented.

Counsel for the relator insisted "that the legislature has never power to change the boundaries of representative districts; that this power is solely to be exercised by the board of supervisors" under the constitution and laws of this state. And secondly, that even if the legislature did have such power, it could only make the change after a new apportionment had been made; that the new apportionment was not made until May 3, 1875, while the act in question was approved April 22, 1875.

We are of opinion that these objections are not well taken. That the legislature clearly has the power to make such changes, unless prohibited by the constitution, cannot be successfully controverted. The only constitutional provision relating to this subject is the last clause of § 4 of *Art. IV.*, which is as follows: "Each apportionment, and the division into representative districts by any board of supervisors, shall remain unaltered until the return of another enumeration."

To enlarge the boundaries of a city, by annexing to it parts of adjoining townships, in such a manner as to interfere with the boundaries of representative districts at a time when such alteration is forbidden, was, in *Attorney General v. Holihan*, held to be a violation of this provision; that the regulations relating to electors only allowed them to vote for representatives in their proper districts, and that they could not be residents of one district and be permitted to vote in some other.

PEOPLE v. BRADLEY.

The time, however, within which such changes are forbidden, is after an apportionment and division into representative districts has been made, and "until the return of another enumeration." Upon the return of another enumeration, it becomes the constitutional duty of the legislature, at its first session thereafter, to apportion anew the representatives among the counties and districts according to the number of inhabitants; and it is equally the duty of the board of supervisors at their annual meeting, next after such apportionment, to divide their respective counties into representative districts; and they are prohibited from dividing any township or city, in the formation of a representative district.

After the return of an enumeration has been made, the legislature may well anticipate the apportionment which it is to make in accordance with this constitutional provision, and it may rightfully assume that the supervisors will perform their clear duty, at the time and in the manner pointed out, and it will be justified in acting upon this assumption. The legislature need not wait, after the return of an enumeration, until a new apportionment has actually been made, before enlarging the boundaries of a city, by annexing thereto territory then belonging to another representative district. In making such change in this manner, there is neither a violation of the constitutional provision quoted, nor of the regulations relating to electors voting for representatives in the district in which they reside. The new enumeration satisfies the constitutional provision, and before another election for representatives can take place, a new apportionment and division is made, which removes the other objections.

If the change could not be made at this time and in this way, when could it be made? If the supervisors alone have power to change the boundaries of representative districts, then the particular change sought for in this case never could have been made. We must take judicial notice of the time when the legislature is required to assemble at

PEOPLE v. BRADLEY.

the seat of government, and we may fairly presume that the final adjournment will take place before the month of October following. The new apportionment may be made so late in the session that sufficient time might not remain after the time for final adjournment had been agreed upon, to pass any acts changing the boundaries of representative districts in this way. The supervisors, meeting in the following October to divide their respective counties according to the new apportionment, could place a city or village, with the territory adjoining, in the same representative district, but they could not divide any township in so doing, as such division is expressly prohibited by the constitution. And after the supervisors have formed the districts, the legislature would then be powerless in the premises until after another enumeration and apportionment had been made, even if it could then act, according to the argument advanced by counsel for the relator.

A more reasonable and practical construction must be given this provision,—one that will not take the entire control of the change in the boundaries of cities from the legislature, or leave that body at the mercy of the boards of supervisors, and that will at the same time preserve intact the constitutional provision both in letter and spirit.

We are clearly of opinion that the legislature did, in April, 1875, have full power and authority to annex a portion or all of South Saginaw to East Saginaw, even although by so doing it interfered with and changed the boundaries of representative districts as then formed.

We now come to consider the last objection urged against the act of April 22, 1875, viz.: that the object of the act is not indicated by its title. The objection is, that the title simply expresses the idea of defining or making distinct the boundaries of the city and its wards; that the word "define" does not indicate an intention to enlarge or extend, but merely to make clear and certain what was before then uncertain, ambiguous or indefinite; while the real object of the act is to put into the city a large extent of territory

PEOPLE V. BRADLEY.

then lying entirely outside of it. It was not claimed, nor could it be successfully, that the title should have expressly stated that certain territory would be detached from the township of Spaulding and annexed to East Saginaw, but that the title should at least have indicated that the limits or boundaries of East Saginaw were to be enlarged or extended.

While the word "define" may be, and frequently is, used in the sense and for the purpose claimed, and while we might concede such to be the general and more popular use of the word, yet it is not used exclusively in such a sense. It has a broader and different meaning. It is frequently used in the titles of acts, and but seldom in the narrower sense, or as merely defining powers previously given. An examination of our session laws will show that acts have frequently been passed, the constitutionality of which have never been questioned, where the powers and duties conferred could not be considered as merely explaining, or making more clear those previously conferred or attempted to be, although the word "define" was used in the title. In legislation it is frequently used in the creation, enlarging and extending the powers and duties of boards and officers, in defining certain offenses and providing punishment for the same, and thus enlarging and extending the scope of the criminal law. And it is properly used in the title where the object of the act is to determine or fix boundaries, more especially where a dispute has arisen concerning them. It is used between different governments, as, "to define the extent of a kingdom or country." Indeed, it is a word of very frequent and general use, and although even the settlement of a disputed boundary must necessarily and inevitably extend the line and take in new or additional territory, within the understanding of one of the claimants, we have never heard of any question being made as to the want of authority to enlarge the possessions of another under a power given to define them.

If the word used by the legislature can in any of its vari-

PEOPLE V. BRADLEY.

ous uses or meanings be considered appropriate or applicable, then we cannot say that they did not have a right to use it in that sense, even although we might be of opinion that a better and more appropriate one might have been chosen, and one that people generally would have better understood.

This constitutional provision, requiring the object of the law to be expressed in the title of the act, has been so frequently and even recently discussed in this state that we do not feel warranted in again attempting to go over the ground.—See *Connecticut Mutual Life Ins. Co. v. The State Treasurer*, 31 Mich., 17, and authorities there cited. We think that none of the evils designed to be prevented by this constitutional provision exist in this case, and although more particularity might have been used, yet the object is fairly indicated and the body of the act is not inconsistent or incongruous with the title.

We are of opinion that under the facts in this case the respondent was legally elected alderman of the eighth ward of the city of East Saginaw, and that he was not at the time of the filing of the information in this case guilty of unlawfully holding and exercising such office of alderman, and judgment must be entered accordingly.

The other Justices concurred.

Leonard Grover v. William D. Fox and William C.
Richfield.

Bill to quiet title: Possession: Title: Res adjudicata: Contract for conveyance: Attachments. A person having conveyed his farm to his wife, the two joined in a mortgage thereof for six thousand dollars running for five years; the wife thereupon gave back to her husband a contract to

GROVER v. FOX.

reconvey to him on his paying the mortgage in five years, and also giving him the right to hold possession during the five years; attachments against the husband were levied upon the farm as real estate; the attachment debtor made assignments of his contract, and quit-claimed the farm to his wife; bankruptcy proceedings were instituted against him, which resulted in an adjudication of bankruptcy; the rights of the attaching creditors, the wife under the quit-claim deed, and the assignees of the contract, came before the bankruptcy court for determination, and it was there held the bankrupt's rights consisted, *first*, of a right to have conveyance of the farm provided he paid the mortgage in five years; and *second*, the right of possession during that term; and the right of the assignee in bankruptcy to the possessory right was sustained as subject to sale absolutely, but the interest in the farm under the stipulation for reconveyance was held to be subject to the attachment levies; the assignee in bankruptcy thereupon sold his interest in the farm and products; judgments were rendered in the attachment causes, executions issued and levied on the farm as real estate, and sales made; the titles of the purchasers at the assignee's sale and of the bankrupt's wife having been brought together in complainant, he filed this bill to quiet his title against said attachment and execution levies and sales:—

Held, That the determination of the bankruptcy court upon the rights of the parties is binding and conclusive upon them; that the evidence is satisfactory as to complainant's possession and in regard to his ownership of an interest to entitle him to bring this bill; and that if the proceedings in the attachment causes are insufficient in law to bind any interest in the farm, and only give a color of right, and finally prejudice complainant's title only as they becloud it, their power to so operate ought to be taken away.

Right of possession of lands for term of years: Chattel interest: Execution levy. The right to the possession of the farm for the five years under the contract was a chattel interest, and if subject to seizure on attachment, it was as a chattel interest, and not as real estate; and a levy upon the farm as real estate, making no reference to the mere possessory right, would not reach that interest.

Contingent right to conveyance: Equitable interest: Levy. The contingent right to a conveyance under the contract was not a legal interest, but a mere equity, and incapable of being held by levy at common law.

Contingent right to conveyance: Equitable interest: Execution levy: Subsequent proceedings. If such contingent right was liable to be subjected upon attachment and execution, it could only be done through compliance with the statute (*Comp. L. 1871, § 4628*) providing for supplementing levies by proceedings to ascertain and determine the interest seized; and assuming the levies were properly shaped to subject such right, it would be indispensable to their continuance in force that proceedings be taken, either before sale or within a year thereafter, to ascertain and determine the interest.

Contract for conveyance: Condition: Time: Attachment levies: Sales. The condition on which the right to reconveyance hinged never having been performed, and the time for its performance having expired before the sales on the executions, the equity of the debtor in the lands was extinguished and no interest or right remained to support the proceedings.

Contract to reconvey: Attachment: Offer to perform. The attachment creditors having purchased in the mortgage, their offer to surrender it to the mortgagor's wife, on condition that she would convey the farm as provided in the agreement she had given her husband, could have no force,

GROVER v. FOX.

as they then had no title to such agreement for conveyance, and had no right to call upon her for performance of its covenants.

Heard April 6. Decided June 6.

Appeal in Chancery from Calhoun Circuit.

Brown & Patterson, for complainant.

T. G. Pray, for defendants.

GRAVES, J:

Complainant, claiming to be owner and in possession of a farm of four hundred and forty acres in Homer, Calhoun county, filed the present bill April 3d, 1875, to quiet his title against certain attachments and executions under which the defendant Fox had sought to subject the premises for liabilities incurred by one Powell Grover. Richfield acted as sheriff, and the only ground of his being made a party was his official connection with the proceedings.

The circuit court, after hearing on pleadings and evidence, granted the relief prayed, and Fox appealed. The matters in the record are numerous and somewhat complicated, and no attempt will be made to specify all. A reference to some of the main facts is necessary.

October 19th, 1867, and prior thereto, Powell Grover owned the farm in question, and with his wife, Elizabeth Grover, and his family, resided on it. He became anxious to engage in lumbering with one Wright in Osceola county, and to effectuate his wish, proposed to raise by mortgage on the farm the sum of six thousand dollars. The family opposed the project, and Mrs. Grover refused to join in the suggested mortgage. The loan was to be for five years, with interest semi-annually at the rate of ten per cent.

Some agreement became necessary to enable Mr. Grover to raise the loan upon the farm, and the following understanding was reached. He was to convey the farm to Mrs. Grover, and thereupon both were to execute the mortgage, and Mrs. Grover was to execute a paper to him, binding

GROVER v. FOX.

herself to reconvey on his paying the mortgage in five years, and also allowing him to hold possession during the five years. This bargain was completed by the execution of the proper writings on said 19th of October. The mortgage was made to one Parker, who provided the money.

Grover and Wright then went into partnership under the name of "Grover & Wright," and a few days later proceeded to the pine woods to carry out the contemplated lumbering operations. In the course of about a year, however, the necessities of the firm required more money, and in raising it Grover made himself liable to Fox on account of two notes of about three thousand dollars each, and also liable to Houck & Ostrom for some two thousand dollars more.

The parties in whose favor these liabilities were incurred knew of the arrangements which had been made between Grover and his wife, and did not give credit to Grover upon the faith of his having any legal title to the farm. These demands being unpaid, three attachment suits were instituted for their collection, two by Fox, and one by Houck & Ostrom. This occurred in May, 1869. The attachments were levied on the farm as real estate of Grover, and on some other property. Some time in the fore part of 1870, Fox, Houck and Ostrom bought the Parker mortgage.

October 19, 1869, bankruptcy proceedings were commenced against Grover & Wright, by a creditor, in the district court of the eastern district of Michigan, and they were adjudged bankrupts November 9th thereafter. C. J. Reilley was appointed assignee, and in the succeeding December the assets were vested in him.

After the levy of the attachments, and within four months next prior to the bankruptcy proceedings, Grover assigned to his wife the agreement for reconveyance, and quit-claimed the farm to her. He also made an assignment to Fox of the agreement for reconveyance.

Subsequently, and on December 6, 1870, judgments were given against Grover in all the attachment suits.

GROVER v. FOX.

September 5, 1871, after full hearing of the attaching creditors and all concerned, the district court, sitting in bankruptcy, adjudicated upon and definitely settled the rights of the respective parties in interest in and concerning the farm.

The attachment levies having been made more than four months before the bankruptcy proceedings, were not disturbed; but the assignments of the agreement for reconveyance, and the quit-claim of 1869 to Mrs. Grover, were held void as against Grover's creditors, and it was decided that the only right Powell Grover held under the arrangement with his wife of 1867 was to have reconveyance of the farm in case of his payment of the Parker mortgage in five years, and to have possession of the farm during that period. The decree in bankruptcy also assumed that the attachment levies were not upon this right of possession at all, and that it accordingly vested in the assignee in bankruptcy and was subject to sale absolutely, whilst the interest in the farm under the stipulation for reconveyance could only be disposed of subject to the levies.

August 27, 1872, the district court, on petition of the assignee, ordered him to sell his interest in the farm and products, and on the next day, and pursuant to the order, he sold and conveyed his interest in the farm for three hundred dollars to Nancy A. and Martha A. Grover, daughters of Powell and Elizabeth Grover. This was of course subject to whatever right the attachments covered.

Executions in the attachment cases had been issued in January, 1871, and levied on the farm as real estate, and on June 10, 1873, the district court granted leave to proceed to enforce the attachment levies in the state court.

January 9, 1874, defendant Richfield, as sheriff, sold the farm on the three executions, the defendant Fox being the purchaser on each.

December, 1874, Nancy A. and Martha A. Grover, the purchasers from the assignee in bankruptcy, conveyed to

GROVER v. FOX.

their mother, Elizabeth Grover, and she conveyed to complainant, who is a son of Powell and Elizabeth Grover.

The Parker mortgage has not been paid. Proceedings on the part of Fox to foreclose it have given rise to another suit, which was heard at the same time with this, and the force of these proceedings will be noticed in the opinion in that case.

The evidence is satisfactory as to complainant's possession, and in regard to his ownership of an interest to entitle him to bring this bill.—§ 5072, *C. L.* Upon that aspect of the case there appears no room for real controversy.

The question on which the case hinges is, whether the claim asserted by Fox, on the strength of the proceedings in the attachment cases, in opposition to the title of complainant, is one which ought to be suppressed.

If those proceedings have force to bind any interest in the farm, they ought not to be hindered from operating in Fox's favor to hold that interest. But if they are not sufficient in law to bind any interest, and only give a color of right, and finally prejudice complainant's title only as they becloud it, then their power to so operate ought to be taken away.

It is sufficiently plain that Fox's claim must be confined to such rights or interests in or upon the farm as were held by Powell Grover at the time of the proceedings.

No other rights or interests in or upon the farm have been touched by the levies. And we are not left to speculate upon the nature or extent of his rights or interests in that regard. The question was distinctly presented and passed upon in the district court, where all parties were represented. The decree there made in bankruptcy, and to which both parties now appeal as conclusive, defined the rights of Powell Grover, as, *first*, a right to have conveyance of the farm provided he paid the Parker mortgage in five years; and, *second*, the right of possession during that term. All further right on his part was denied.—*Wiswall v. Campbell*, 3 Otto, 347.

GROVER v. FOX.

There is no occasion to discuss the question as to whether the possessory right so held by Powell Grover was subject to seizure on attachment or execution, because if it was, the record shows that in fact it was not levied on at all. The district court evidently so considered, and acted on that opinion. The levies concerning the realty were upon the farm as real estate, and they made no reference whatever to such a right as that in question. If subject to seizure, it was as a chattel interest, and not as real estate.—*Buhl v. Kenyon*, 11 Mich., 249; *Gorham v. Arnold*, 22 Mich., 247.

That Powell Grover was owner of the right, could therefore afford no support to the claim of Fox under the proceedings in the attachment cases.

We then come to the other interest, the contingent right to a conveyance. This was not a legal interest. It was a mere equity, and incapable of being held by levy at common law. If liable to be subjected upon attachment and execution, it could only be so through compliance with the statute for supplementing the levies by proceedings to ascertain and determine the interest seized.—§ 4628, C. L. The right was not proceeded against, however, as an equity. As before stated, the levies were upon the farm, as real estate held by the debtor under legal title, and the sales and other steps were conducted on that theory.

But passing all objections based upon the circumstance that the levies were made and sales conducted as in case of legal interests in real estate, and assuming that they were properly shaped to subject the right of Powell Grover, and still, as before stated, it was indispensable to the continuance of force in the levies, to take proceedings, either before sale, or within a year thereafter, to ascertain and determine the interest.—§ 4628.

At the time the bill was filed, however, this period had long passed and yet no such proceeding had been taken anywhere, unless the action in bankruptcy should be deemed to answer the purpose. Fox, virtually admitting the neces-

GROVER v. FOX.

sity of such a proceeding, contends, nevertheless, that the action in bankruptcy was in character proper to satisfy the sense of the statute, and that no other proceeding was requisite to define the landed interest attached. Whether this is correct or not, it is useless to consider; because, admitting it to be so, and still it appears that the definition actually given by the district court fails utterly to give efficacy to the attachment proceedings against any right in or to the farm.

The court proceeded to ascertain and settle the right of Powell Grover, and decided that it was conditional, and would wholly cease at the end of five years, computed from the 19th of October, 1867, unless in the meantime he paid the Parker mortgage.

The mortgage has never been paid, and hence the right to call for conveyance expired long prior to the sales on execution. The equity, therefore, ceased long ago, and no interest or right has remained for the proceedings to apply to.

No importance can be attached to the alleged offer of Fox, Houck and Ostrom to Mrs. Grover, in August, 1872, to surrender to her the Parker mortgage and the agreement she gave her husband for conveyance, upon the condition that she would convey as provided in the agreement. They had no title to the agreement for conveyance. Nearly a year before, the court in bankruptcy had declared the assignment under, which they claimed to hold it, to be void. And at the time of the offer, it was not yet ascertained who, if any one, would become entitled by force of proceedings in the attachment suits.

The conclusion reached is, that when this bill was filed, whatever may have been the state of things in construction of law before, there was no living interest in or to the farm, or any part of it, subject to the attachment proceedings, and that such proceedings, in so far as they purport to affect the farm, have no other operation than to becloud complainant's title, and in that way prejudice his right.

GROVER v. FOX.

No notice has been taken of the great mass of objections in the record to the attachment proceedings. A great many, certainly, have no force in such a case as this.

The decree should be affirmed, with costs.

The other Justices concurred.

Leonard Grover v. William D. Fox and Charles D. Holmes.

Mortgages: Power of sale: Statutory requisites: Mistake: Good faith. In executing the power of sale in a mortgage the statutory proceeding must comply substantially with all the conditions set by the legislature, and those who conduct the foreclosure must observe good faith, and pay a proper regard to the interests of all who may be affected by the proceedings; and no defect or misstep in matters of substance will be cured or excused by any proof that it happened by mistake, and was not induced by a bad purpose.

Mortgages: Statutory foreclosures: Illegalities: Giving time to redeem. An offer to the mortgagor to give him time within which to redeem from foreclosure sale the whole or part of the premises, cannot avail to correct illegalities, or to preclude the mortgagor from taking advantage of them and demanding to redeem as matter of right; and the limit of time proposed for redemption in this case, being but ten days, was inequitable.

Contiguous parcels occupied as one farm: Sales in parcels. The query is suggested, whether where premises are composed of contiguous parcels occupied together as a single farm, a sale in parcels is essential to a valid foreclosure.

Statutory foreclosures: Sale in parcels. The sale having been made in parcels, however, if incapable of being sustained as a sale in parcels, it cannot stand as a valid sale in bulk; the sale must be contemplated as it was, rather than as it was not.

Statutory foreclosures: Deeds: Sale: Parcels. A deed which represents the sale as one made in bulk for a single bid, is not a proper one where the sale was in fact in separate parcels and for several bids.

Foreclosure deed: Acknowledgment: Statute construed. Though the statute makes no express requirement that the deed executed and delivered on foreclosure sale shall be acknowledged, or have appended a certificate of acknowledgment, yet in view of the fact that the statute contemplates that the deed when placed on file shall be complete and in a condition to be recorded, in case redemption is not made, and considering the established practice in that regard, it is deemed essential.

Foreclosure deed: Ante-dated: False certificate of acknowledgment. A deed

GROVER v. FOX.

executed and put on file ten months after the sale and falsely ante-dated and acknowledged as of the day of the sale, is not a valid foreclosure deed.

Statutory foreclosures: Two separate deeds: Inconsistent deeds: Ambiguity: Files. Where on a foreclosure sale made in parcels a deed is made and filed in proper time, but which misrepresents the sale as one made in bulk and for a single bid, and thereupon, after ten months, a new deed is executed, properly representing the sale as one made in parcels but which is antedated and purports to have been acknowledged on the day of the sale, and this, too, is put on file, the proceedings thereby become so duplicated and ambiguous as to be void. Parties are entitled to have the papers on file of themselves identify the sale and convey distinct information, without the aid of extrinsic inquiries, as to the time and manner of the sale and the price or prices bid.

Sale in parcels: Sufficient sold to satisfy mortgage: Further sale void. Where a foreclosure sale is made in parcels, when enough parcels have been sold to satisfy the mortgage debt and all costs and expenses, the power of sale is exhausted, and affords no authority to make further sales of the remaining parcels.

Irregular statutory foreclosure: Bill to redeem: Decree: Void sale: Sale under decree. On a bill to redeem from an irregular foreclosure, the foreclosure proceedings being found invalid, the decree should provide for redemption from the mortgage as an unenclosed security, and not from the void sale; and in determining the amount to be paid on such a redemption, it is erroneous to make a rest in computing interest at the date of the sale; and the decree should provide for a sale as on foreclosure to produce satisfaction, in the event of failure to redeem.

Heard April 6. Decided June 6.

Appeal in Chancery from Calhoun Circuit.

Brown & Patterson, for complainant.

T. G. Pray, for defendants.

GRAVES, J:

This cause was heard at the same time as the case of *Grover v. Fox & Richfield*, *supra*, p. 453, and it is a branch of the same general controversy to which that case belongs.

It will not be necessary to repeat the facts given in the other suit.

The present bill was filed by Grover for relief against proceedings to foreclose the Parker mortgage, mentioned in the other case, by advertisement, and Holmes was joined as defendant on account of his connection as register of deeds with the proceedings. After hearing on pleadings and proofs,

GROVER v. FOX.

the circuit court allowed Grover opportunity to redeem on certain specified terms, and both parties appealed.

It will be remembered that the mortgage was given by Powell Grover and Elizabeth Grover, his wife, to Alvin E. Parker, October 19th, 1867, on the Grover farm in Homer, in the county of Calhoun, containing four hundred and forty acres, to secure payment of six thousand dollars of principal, in five years from October 3, 1867, with interest at ten per cent., payable semi-annually.

The mortgage further provided for the payment of an attorney's fee of seventy-five dollars in case of foreclosure, and also that interest not paid when due should become principal and draw interest at the rate previously prescribed until paid.

The farm consists of nine distinct parcels of land. The mortgage contains ten descriptions, but the last only covers the eighth and ninth, and gives no additional quantity.

As appears in the other case, complainant acquired an interest entitling him to redeem prior to the bill.

In January, 1870, the defendant Fox, together with John P. Houck and Isaac L. Ostrom, acquired the mortgage, and June 12, 1873, gave notice of foreclosure and sale pursuant to the power of sale and the regulations of the statute. The present solicitor and counsel of Fox acted as their attorney in the statutory foreclosure. The sale was postponed from time to time until the 9th day of January, 1874, and on that day the whole premises were sold to Fox for the aggregate sum of ten thousand four hundred dollars.

The defense maintains, and the claim is sustained by the evidence in the record, that in fact Fox and his co-owners of the mortgage treated the premises at the sale as comprised of nine separate and distinct parcels salable separately, and that they actually sold each of such pieces by itself and for a distinct price, and that the several parcels brought the following sums: One brought sixteen hundred dollars, one two thousand dollars, one eight hundred dollars,

GROVER v. FOX.

one thirty-two hundred dollars, one sixteen hundred dollars, one six hundred dollars and three others two hundred dollars each.

The only matter in the record indicating the order of sale gives it as here stated.

When the sale was finished, the attorney for Fox, Houck & Ostrom, prepared the deed they desired the sheriff to execute to Fox, and which should be placed on file in the office of the register of deeds. But this deed imported that the whole premises had been sold in one parcel to Fox, and for the sum of ten thousand four hundred dollars, and contained no indication that the farm had been sold in distinct tracts or pieces and for specific sums.

The sheriff executed and acknowledged the deed as of January 9, 1874, and on the same day he made affidavit of the sale, and therein represented it as a sale of the whole farm as one parcel and for one sum.

On the same day, also, an affidavit by the printer was made, showing what publication of notice had been given, and on the 10th or 11th of January, 1874, these papers, with the sheriff's certificate on the deed, showing when it would be absolute, were filed in the office of the register of deeds.

For nearly ten months, and until the 6th of November, 1874, no other papers were filed. At that time, however, the attorney for Fox prepared a new deed, describing the sale according to the fact and showing that the premises were sold in parcels, and stating the order as hereinbefore given. In other respects this deed was like the first. It was antedated to January 9, 1874, and signed by the sheriff, and his acknowledgment of execution was certified as of January 9, 1874. A new affidavit of sale by the sheriff, and also a new affidavit of publication by the printer, were made, but the jurats were antedated to January 9, 1874. This new deed, with its erroneous date and antedated certificate of acknowledgment, and antedated certificate of the

GROVER v. FOX.

time when the deed would become absolute, together with the irregular affidavits, were caused by Fox to be filed in the register's office, November 6, 1874.

The first papers were not removed or changed. They were suffered to remain in the place they had previously occupied, and being the place devoted to regular papers of that class, no warning or explanation was put on file to show that these papers were irregular or not confided in, or that they were considered as superseded. They stood with the same apparent significance they had borne from the beginning. Having the purpose to redeem the whole or at least a part of the farm, complainant called repeatedly and examined the papers before the second set were filed. He also called subsequently with the same object, but neither discovered nor was shown any of the new papers. Finally, and on the evening of January 8, 1875, being the last day for making redemption, he, together with his attorney and two others, waited at the register's office to effect, if practicable, a redemption of the homestead, and possibly of another parcel.

His business was made known to the register to whom he tendered money enough, as turns out, to redeem the two parcels.

The register examined the first deed, and finding that it contained no basis for the redemption of part, refused the tender, and refused to recognize any right to redeem less than the whole. He gave no intimation that the first deed had been superseded, or that a second set of papers had been placed on file.

He must have forgotten the filing of the new instruments, and been misled by seeing the others where the papers in the case belonged. In other words, the placing of two sets of papers on the files, where the law contemplated but one, caused him to act upon the first set, and as though it was the only set on file. Neither complainant nor his attorney had any knowledge or notice of the existence of the second set of papers.

GROVER v. FOX.

January 11, 1875, the attorney for Fox called upon the register and desired him to record the second deed. At the same time he took and carried away the first deed, against the register's objections. That deed has been practically repudiated and cancelled by Fox, and is admitted to be a nullity.

Immediately succeeding the request made to him to record the second deed, the register notified its existence to complainant's attorney.

On one or two occasions after the expiration of the year, Fox, speaking through his attorney, informed complainant he could have ten days to redeem the whole or part of the premises. This could not avail to correct illegalities or to preclude complainant from taking advantage of them and demanding to redeem as matter of right. If the right existed, it was not competent for Fox to impose conditions. The terms would depend upon the requirements of equity, and the limit of ten days was not equitable or based on any legal authority.

We come then to the general question, was the mortgage foreclosed and the right of redemption cut off by the steps taken therefor.

It is well settled that in executing the power of sale in a mortgage the statutory proceedings must comply substantially at least with all the conditions set by the legislature, and those who conduct the foreclosure must observe good faith and pay a proper regard to the interests of all who may be affected by the proceedings, and no defect or misstep in matters of substance will be cured or excused by any proof that it happened by mistake and was not induced by a bad purpose.—*Lee v. Mason*, 10 Mich., 403; *Doyle v. Howard*, 16 Mich., 261; *Sandford v. Flint*, 24 Mich., 26; *Dodge v. Brewer*, 31 Mich., 227; *Udel v. Kahn*, Id., 195; *Montague v. Dawes*, 14 Allen, 369; *Roche v. Farnsworth*, 106 Mass., 509; *Byers v. Surget*, 19 How., 303.

Fox and his co-owners of the mortgage sold and he bought in parcels, and complainant regarded a sale in that

GROVER v. FOX.

way as lawful, and both parties have assumed in argument, that although the premises were composed of contiguous parcels and made one farm and were occupied as one parcel, still a sale in parcels was essential to a valid foreclosure. Not being required to pass upon that question, no opinion is given on it.

In the circumstances of this case, it is sufficient that in fact the farm was disposed of in parcels.

The sale must be contemplated as it was, rather than as it was not. If incapable of being sustained as a sale in parcels it cannot stand as a sale in bulk; because all are agreed that there was no such sale as that.

Without dwelling on others, there are three grounds of objection to the proceedings which may be noticed: *first*, in *Doyle v. Howard*, *ubi supra*, this court held that unless the proper deed was filed within a suitable time, and certainly within the year, the sale would be void. All admit that the first deed was not a proper one. If it be conceded that the filing of the second about two months only before the expiration of the year was in a suitable time, was the deed itself in compliance with law? The statute contemplates that the deed when placed on file is finished and in a shape to be recorded in case redemption is not made, and although no acknowledgment of execution is in terms required by the chapter regulating foreclosures, still the profession have always considered that the general statute applied and rendered it necessary that the execution should be regularly authenticated to complete the deed for record. So universal has been the opinion, that there has never been any deviation in practice. Even in this very case the necessity was recognized.

The deed relied on bore the form of a certificate of acknowledgment pursuant to § 4210, *C. L.*, which requires the "*true date*" to be expressed. The certificate was false, however. It imported an acknowledgment of execution taken nearly ten months before the deed was in fact made. This was designed, and was not only known to Fox as the

GROVER v. FOX.

party foreclosing and purchasing, but was in reality the act of his attorney. Admitting that no wrong was intended, it was still not a lawful proceeding. There is strong reason for the opinion that in consequence of this the deed was not such a deed as the law requires, and that Fox's connection with the illegality disentitled him from demanding that the deed should stand and be recorded. Assuming this to be so, then no proper deed was filed within the year.

Second, The first deed is admitted to have been invalid. It was deposited where it would have rightly belonged if it had been valid, and accordingly in the exact place where those interested in ascertaining were to look for any deed made on the foreclosure of the mortgage. It was allowed to remain there until the year for redeeming had expired. These proceedings were dictated by Fox through his attorney, and he was responsible for them. However blameless in intention, the course so pursued caused the files to grossly misrepresent the sale, and to hold out false colors to the public and mislead complainant.

The first deed, and no other, being found soon after the sale, in the place set apart for foreclosure deeds, and having been repeatedly seen in the same place, and unaccompanied by any other for nearly ten months, complainant had no reason thereafter, upon finding the first deed as usual, to suppose that there would be found by further search the second and different deed which Fox's attorney caused to be placed on file on the 6th of November.

The perception of the old deed under the circumstances must naturally have put an end to search. The law provided for only one deed, and the first one presenting itself, as it did, implied that there was no other, and Fox is not entitled to hold complainant against the fact to a knowledge of the second deed from its having been placed in the files which held the other. Complainant did not discover it, and had no notice in fact of its existence, and the course taken in the proceedings, and for which Fox is responsible

GROVER V. FOX.

naturally and plainly served to veil the second deed from complainant and to defeat the leading purpose of the law in requiring such deeds to be filed, and so completely was the intent of the regulation defrauded, that even the register, who had certified the filing of the second deed, was himself entirely misled when called on in the evening of January 8th to attend to a redemption of part of the premises.

These unauthorized and improper proceedings were deceptive and inequitable and not a fair and just execution of the power of sale, and considering the actual positions and attitudes of Fox and complainant, Fox's situation as claimant under the proceedings was no better as against complainant than it would have been if no deed at all had been filed within the year.

But suppose the fact had been different, and complainant, instead of being led to believe that the first deed was the only one filed, had actually discovered the second deed in the files also; he was legally entitled to have the *files* inform him distinctly and without ambiguity about the sale, and whether the land had or had not been sold in parcels, and in regard to the price or prices, and was also entitled to have the *files identify* the very deed to be wholly or in part canceled in case of redemption, and to be recorded as a conveyance if not canceled by redemption. The law required this, and did not contemplate extrinsic inquiries to settle such matters. It was intended that the *files* should make known these important facts. Now here were two deeds made to carry out the same foreclosure, and alike on their faces in every particular except as to the manner of sale, one denoting that the farm was sold in one parcel and for one sum, and the other that it was sold in nine parcels with a specific price for each parcel, and the files contained no sign or hint to show which of these deeds must be rejected and which acted upon.

Here, again, the proceedings were confused, ambiguous and irregular.

Third, The notice of sale, dated June 12, 1873, claimed

GROVER v. FOX.

that there was due at that time, for principal and interest alone, the sum of nine thousand four hundred and sixty-three dollars and ten cents. If to this be added the interest to the time of sale, on January 9, 1874, together with all the costs and expenses charged, the aggregate is found to be considerably less than ten thousand four hundred dollars, at which the premises are admitted to have been sold, and yet there is no intimation or pretense that Fox paid any thing beyond the mortgage debt and the costs and expenses. Indeed, the case implies that he did not, and that the debt, costs and expenses were treated as an equivalent.

It is next observable that according to the agreed computation found in the record, and of which Fox does not complain, the whole sum required to satisfy the mortgage and pay all costs and expenses at the time of sale was in fact but nine thousand three hundred and fourteen dollars and eighty-eight cents, and much less than was claimed some seven months earlier in the notice of sale for the bare principal and interest, and yet during that seven months interest accumulated on the principal sum at the rate of ten per cent.

Whether this sum of nine thousand three hundred and fourteen dollars and eighty-eight cents should not be regarded as excessive, is not material for the present purpose. It is sufficient that Fox does not complain that it is too small.

Now we have seen that nine parcels were separately sold, and that the sales aggregated ten thousand four hundred dollars and exceeded by one thousand and eighty-five dollars and twelve cents the required amount as shown by the agreed computation, and likewise considerably exceeded the required amount if the sum claimed in the notice of sale is taken as a basis.

And it is further seen that *prima facie* too much was sold by three parcels at least if the sum found by the computation is taken as the true one, and too much *prima facie* by one parcel at least even if the claim in the notice is taken as correct. The conclusion is unavoidable that grave

GROVER v. FOX.

error was committed on this side of the proceeding, and that the power of sale was unlawfully executed in respect to the number of parcels sold. When enough had been sold to satisfy the mortgage debt and all costs and expenses, the power was exhausted, and the holders of the mortgage were without authority to make sale of more parcels. The statute recognizes this natural and plain limit, and in order to guard against abuse, expressly forbids the sale of more parcels, tracts or lots than shall be necessary to satisfy the amount due at the date of the notice of sale, with interest and the costs and expenses allowed by law.—§ 6918, *C. L.*

On the whole, it is quite evident that the statutory foreclosure cannot stand in the way of adequate relief to complainant.

The only material question which remains concerns the form the relief ought to take, and a few words will dispose of it.

The decree below was grounded on the theory of allowing redemption from the sale under the proceedings to foreclose, instead of allowing it against the mortgage as an unforeclosed security; and in ascertaining the amount to be paid on redemption, a rest was accordingly made in computing interest at the date of the sale.

Complainant's counsel has made this the basis of an argument against compound interest, which he urged the court had allowed on the strength of the provision in the mortgage for the payment of interest on overdue installments of interest. The argument was scarcely warranted by the decree, which did not contemplate the compounding of interest in any accurate sense, and certainly there is no occasion for discussing the subject. The defense sets up no claim for compound interest, and no scheme of relief suggests itself as proper which would involve the allowance of it.

The principle of allowing redemption from the sale does not appear sound, and a departure from it will obviate certain objections made by complainant at the hearing, and render a special reference to them unnecessary.

GROVER v. FOX.

The proceedings to foreclose have been found irregular, insufficient and inequitable, and not of force to bar redemption against the mortgage and to require the complainant to seek redemption from the sale, and hence the premises should be held redeemable from the mortgage as an unforeclosed security, and not from the invalid sale.

And under the circumstances, the general scheme of the decree ought to be the same as in *Fosdick v. Van Husan*, 21 Mich., 567.

There the irregular proceedings at law were set aside and not allowed to stand and mystify the title, and redemption was authorized against the mortgage, and it was provided that in the event of failure to redeem, a sale as on foreclosure should be had to produce satisfaction.

The result is, that the decree below should be reversed, and a new decree entered, setting aside the proceedings to foreclose under the power of sale, and authorizing complainant within some reasonable time to redeem the premises from the mortgage on payment to defendant Fox, or his solicitor, or to the register of the court below, the proper amount therefor, and providing, on the other hand, for a sale of the premises as a foreclosure in equity, in case of complainant's failure to redeem within the time allowed therefor.

There appears to be no objection to Fox's claim on account of taxes which he paid and which are specified in the computation made under stipulation, and hence they should be allowed, with interest at seven per cent.

The interest at the rate of ten per cent. on the mortgage should be brought down from October 3, 1867, to the date of the decree, and except six hundred dollars paid, should be added to the principal. The interest at seven per cent. on the sums paid for taxes should also be brought down from the several times of payment to the date of the decree, and added to the sums paid for taxes; and on the sum made up of principal and interest on the mortgage, interest should be allowed at the rate of ten per cent. from the date of the decree to the redemption or sale, as the case may be, and on the sum made up of taxes and interest thereon, interest

GROVER v. FOX.

should be allowed at seven per cent. from the date of the decree to redemption or sale. The addition, at the time of redemption, of the two principals and the accrued interest, will give the sum required for redemption. Complainant should recover costs of both courts.

The other Justices concurred.

Mary Metz and another v. Helen G. Todd and others.

Mortgages: Collateral to notes of third persons: Payment. Complainants having filed their bill to foreclose a mortgage given to secure payment of four promissory notes made by third persons and which the mortgagors had delivered to complainants on the purchase of the mortgaged premises, the theory of the defense, that the notes were received in payment for the land and that the purchasers were not to be looked to for payment except upon the mortgage and according to its conditions, is held to be supported by the proofs.

Mortgages: Notes of third persons: Sureties: Extension: Release. The mortgagees in such mortgage having, for a consideration paid to them, and without the knowledge of the mortgagors, extended the time of payment to the maker of the only note remaining unpaid, the land thereby became discharged from the mortgage lien; the mortgagors, though not personally liable as sureties, yet as owners of the mortgaged land they occupied that position.

Heard April 10. Decided June 6.

Appeal in Chancery from Calhoun Circuit.

E. Baxter and J. C. Post, for complainants.

Severens, Boudeman & Turner, for defendants.

COOLEY, CH. J:

This is a foreclosure suit. The mortgage was given by defendants Helen G. Todd and Alice M. Terry, to secure the payment of four promissory notes made by third persons, and which the mortgagors had delivered to complain-

METZ v. TODD.

ants on a purchase of the land mortgaged. The bill avers that the four notes were delivered to the complainants "as security for the payment of the purchase price," and that the mortgage was taken at the same time to secure the payment of the notes. It is claimed by the defense that the notes were received in payment for the land, and that the purchasers were not to be looked to for payment except upon the mortgage and according to its conditions. The evidence satisfies us that this defense is well founded.

It is also claimed on the part of the defense that on the only note now remaining unpaid, and which was made by one Frink, the mortgagees, for a consideration paid to them, and without the knowledge of the mortgagors, extended the time of payment. The mortgagors then insist that, though not personally at any time liable as sureties, yet as owners of the mortgaged land they occupied that position, and consequently the extension granted to the principal debtor, without their consent, discharged the land from the mortgage lien. That the claim is well founded if the proof establishes the extension, we think is undoubted.—*Neimcewicz v. Gahn*, 3 Paige, 614, and *Gahn v. Niemcewicz*, 11 Wend., 312; *Christner v. Brown*, 16 Iowa, 130. We also find the facts to be in accordance with the theory of the defense.

The decree must be affirmed, with costs.

The other Justices concurred.

The City of Coldwater v. Chester S. Tucker.

Municipal corporations: Exercising powers beyond their limits. The general doctrine is clear, that a municipal corporation cannot usually exercise its powers beyond its own limits; and if it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it.

COLDWATER v. TUCKER.

Cities: Contracts: Public works outside their limits. The query is suggested, whether, even by contract, a city can build or possess public works beyond its limits, without plain permission of the legislature.

Cities: Sewerage: Extension beyond city limits: Necessity: Implied authority. The authority of a city to provide sewerage beyond the city limits may be implied from the existence of a state of facts which renders it actually necessary or manifestly desirable, as where a city, though bounded by a stream, is required by its charter to preserve the stream from pollution and prevent the depositing of filth therein, and no other outlet is reasonably available except through means of ditches extending beyond the limits.

Sewers: Outlet beyond city limits: Discretion. And where the drainage requires an outlet beyond the city limits, and the surroundings are such as to raise the implication of authority in the city to conduct the work beyond its limits, the city must be permitted to retain some discretion as to the arrangements by which it shall accomplish the purpose; and there is no legal obstacle to its undertaking to do this work by its own servants or contractors, instead of employing the owner of the premises to do it.

Drainage: Cities: Outlet: Contract to extend and enlarge ditch: Corporate powers. A city thus situated having led its sewer to the city limits, where it emptied into a county ditch, which was found to be inadequate, made a contract with the adjoining proprietor to enlarge and straighten the ditch through his premises, so as to provide for carrying off all the water without overflowing or saturating his land, agreeing to keep the ditch in repair, not to injure or obstruct the cross-ditches, and to maintain a good bridge across it on his premises:—

Held, That the work undertaken by the city could not be regarded as repugnant or foreign to the purposes of its charter, and that the contract was not beyond the corporate powers.

Contract: Construction: Extraordinary and unexpected floods. The undertaking by the city in such contract to make the ditch sufficient to carry off all water without overflowing or saturating the adjoining premises, cannot be construed to obligate the city to make provision for extraordinary and unexpected floods, or to put the proprietor in any better condition than he would have been with the ditch as it was before and with the extra city flowage excluded.

Contract: Neglect in repairs: Arbitration: Damages: Forfeiture. The contract having made provision for a settlement by arbitration for any mischief caused by neglect in repairs, this indicates a design that such neglect should not terminate the contract, unless the failure were so great as to amount to a practical abandonment of the contract obligation.

Contract: Injunction: Drainage: Obstruction. The city in making the improvement in the first instance having in good faith substantially complied with its obligation, and constructed a ditch apparently satisfactory at the time to the other party to the contract, and no serious fault or neglect being established against the city, injunction is granted to restrain the owner of the premises from filling in the ditch so as to obstruct the city flowage.

Heard April 11. Decided June 6.

Appeal in Chancery from Branch Circuit.

COLDWATER V. TUCKER.

Loveridge & Barlow and Upson & Thompson, for complainant.

J. H. McGowan and Ashley Pond, for defendant.

CAMPBELL, J:

The bill in this case was filed to restrain defendant from obstructing a ditch through his lands adjoining the city of Coldwater, which he is alleged to have attempted in violation of an agreement whereby a right was assured to the city to use it for an outlet of drainage.

It appears that in 1862, or thereabouts, a county ditch was laid out through defendant's lands and lands north of them to a branch of Coldwater river. The city of Coldwater, lying immediately south of Tucker, had by drainage, partly natural and partly artificial, turned the surface water of a considerable tract into the county ditch. A lawsuit having grown out of this action, a compromise was effected; and on the 9th of March, 1867, an agreement in writing was made, which, among other things, provided that Tucker would allow the ditch across his premises to be enlarged so as to carry off the water from the city ditch, upon condition that the city should enlarge and straighten his ditch and the continuation of it northerly, so as to provide for carrying off all water without overflowing or saturating his land. The city was to keep the ditch in repair and keep up a good bridge across it on his premises, and the cross-ditches were not to be injured or obstructed. All damages were to be arbitrated.

The active work to be done was all to be done by the city, as well in maintaining and repairing as in enlarging the ditch. The city could at any time terminate its obligations by shutting off the flow from its own territory.

It is not denied that Tucker has obstructed the flow of the water. His defense is: *First*, That the city is in default; and *second*, that it had no authority to make the contract and cannot, therefore, enforce it or be compelled to carry it out.

COLDWATER V. TUCKER.

The charter of the city,—which was granted in 1861,—contains no express authority to execute drainage works beyond the city limits. It does contain general authority over drainage. It is not insisted that any right would have existed to turn the drainage in question upon Tucker's land, if there had been no ditch across it, or in such case to dig such a ditch without his consent. The case shows that the ditch existing there was dug as a county ditch after the city was incorporated, and was not designed, and was not adequate, in its original shape, to serve the purpose provided for in the contract.

At the time when the county ditch was dug, there was no statute in force providing for any combined action between the drain commissioners and the city authorities, or authorizing county ditches to extend into cities. In February, 1867, an amendatory statute was passed, giving commissioners authority, with the consent of the corporate council or trustees, to extend ditches into cities and villages and assess the expense as in other cases.—*L. 1867, pp. 3, 4.* How far this statute operated in leading the parties to a settlement immediately after its passage, we are not informed. But they seem to have preferred arrangements of their own to leaving the matter to be managed by the commissioners.

By this contract the city undertook to do certain work outside of its own limits, where its power to secure the result bargained for depended on its power to make a private contract with outside landowners, and not upon any statutory or chartered authority. The ditch itself was laid out under the supervision of the drain commissioners, and the right to enlarge it without the consent of the landowners, could only be obtained by statutory proceedings under their authority. And whether enlarged or not, the work was not under city jurisdiction. If the contract was valid, the city acted, so far as this work was concerned, in the same right as a private person, contracting to do work on the land of another.

The general doctrine is clear that a municipal corpora-

COLDWATER V. TUCKER.

tion cannot usually exercise its powers beyond its own limits. If it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public policy have induced the legislature to grant such power. The commonest instances are, where a supply of water can only be obtained from a distance. Where the city erects its own works or lays its own pipes for such a purpose, it has usually been found necessary, in order to furnish adequate safeguards for the preservation of the property, to pass special statutes to cover the case. There would be serious difficulties attending the management of expensive public works situated in one town or city, and owned by another, unless expressly provided for. If a city cannot regulate and protect its public works against injuries and interference, they are liable to serious dangers. The noted case of *Bailey v. Mayor, etc., of New York*, 3 Hill, 531, and 2 Denio, 433, illustrates some of the complications arising from the necessity of going beyond the limits of a city for water. In the absence of any sufficient legislation to overcome the difficulty, the power to make provision for outside work, if existing at all, can only be exercised by resorting to contracts to obtain rights and privileges which, within the city, can generally be secured, if necessary, by proceedings *in invitum*. It would still be an important question, whether, even by contract, a city can build or possess public works beyond its limits, without plain permission.

In the present case, for example, if there can be any implication that sewerage may be provided beyond the city, it must arise from the existence of a state of facts which renders it either actually necessary, or at least manifestly desirable. It is easy to see that the practical necessity of removing sewerage beyond city limits must very often arise. Drainage, whether of surface water or of impurities, can seldom be effectual unless connected with running water which will remove it beyond the inhabited limits. Public health and convenience require this resort. A power to

COLDWATER V. TUCKER.

"construct, repair, and preserve sewers, drains," etc., would be useless unless they could be connected with some safe outlet. In the present case, it appears that a branch of the Coldwater river is a city boundary. But it also appears from the charter, that the pollution of that stream was designed to be prevented. One of the special powers of the city is "to provide for the clearing the Coldwater river, and races connected therewith, of all drift-wood, filth, or other nuisances, and to prohibit and prevent the depositing therein of all filthy and other matter tending to render the water thereof impure, unwholesome, or offensive."—§ 10. This makes it the duty of the city to find drainage, if possible, where it will not produce these evils, and there seems to be no reason why an outlet should not be sought elsewhere, provided the charter furnishes the means of obtaining one, expressly or by fair implication.

If it can only be obtained by building a sewer or ditch beyond the city, the charter seems to be defective, in making no express provision for such works. But if by leading a sewer or ditch to the city limits it can be connected with an outlet beyond, there would seem to be no reason for preventing such connection. Drainage is a public necessity.

In the present case, such an outlet was supposed to exist, but it was not large enough, and it could not be used without permission. The contract in dispute was made to secure the enlargement of the ditch, and the right to connect it with the city ditch, already existing up to the city boundary, which was practically useless without this outlet.

While there are very serious difficulties in the way of controlling and protecting such works outside of the city, yet if the drainage is to find an outlet beyond the city limits, it must be somewhat discretionary with the city to make such arrangements as might be made by natural persons for similar purposes. We can see no legal objection to an undertaking by the city to do this work by its own servants or contractors, instead of employing Tucker to do it. It is

COLDWATER v. TUCKER.

not only usual, but it is frequently obligatory to let city jobs to contractors on bids, and it was not unreasonable to retain control, so far as Tucker was willing to permit it, so as to give the city a choice of means as occasion should arise for doing work or making repairs.

We think, therefore, that the work in question cannot be regarded as repugnant or foreign to the purposes of the charter, and that the contract was not beyond the corporate powers.

The question next arises, whether complainants have lost their rights under the contract.

The defense on this point rests on the claim that the ditch was not properly constructed, and was not large enough to carry off all the water. It is claimed that the lands of Tucker have been overflowed and damaged, and that the ditch has produced saturation of the soil to an amount which has led to mischief. There is also a claim that the bridge over the ditch has not been kept in order.

The evidence shows that the ditch in question passes through a part of Tucker's land somewhat higher than a portion lying east of it, and that this land has been at times submerged, and has continued so long enough to interfere with its profitable culture. The testimony, however, is conflicting upon both cause and effect, and does not lead to entirely satisfactory results on either side. The damage from the condition of the bridge is of very small account in any event.

Of course it cannot be supposed that the object of the contract with Tucker was to put him in any better condition than he would have been had the old ditch remained as it was, and the extra city flowage been excluded. Neither can it be held requisite, for the same reason, that the new or enlarged ditch should be made adequate for extraordinary and unexpected floods.

There is nothing to show that the enlargement when made was not entirely satisfactory to Tucker, nor that it was not really adequate so far as any judgment or experi-

COLDWATER v. TUCKER.

ence could then determine. It seems to have been made amicably and in good faith. We think that the proof does not sustain the claim that the water does not flow freely beyond Tucker's land to the north. The impression made on our minds by the whole evidence is, that the deficiency in drainage of Tucker's surface soil arises chiefly from his failure to dig a sufficient number of lateral drains to relieve the land. It is claimed, but we do not think it is very well established, that these drains were obstructed by the fault of the city. On the contrary, we think they appear to have worked as well as their construction was likely to make them. No human foresight can prevent the effects of a cold and snowy winter on an open ditch, or provide immediate way for the waters gathering after an unusual and violent storm. Sluices large enough for every such emergency would be extravagant in cost and wasteful in the appropriation of land.

We cannot avoid the conclusion that the city in digging out and maintaining this ditch has substantially complied with its obligation. For any mischief caused by neglect in repairing deficiencies, the contract provides that there shall be a settlement by arbitration. This, we think, indicates a design that such neglect shall not terminate the contract, unless the failure is so great as to amount to a practical abandonment of the contract obligation. This agreement was made to subserve purposes of public health and convenience, and not on private grounds. Any obstruction of the city ditch must work irreparable mischief, reaching far beyond the inconvenience of private landholders. Such mischief as Tucker is likely to feel from the neglect of the city can, for the most part, if not entirely, be obviated at small expense. The city could probably, had it seen fit, have secured the same end, with no more expense to its citizens, and with no greater convenience to Tucker, by calling in the aid of the drain commissioners. He has no right to take the law into his own hands, and abrogate a contract designed to be permanent, merely because mischiefs may have arisen which the agreement expressly recognizes

COLDWATER v. TUCKER.

as possible, and against losses from which it provides a special form of redress.

We think the court below was right in rendering a decree enjoining the defendant from interfering with the ditch. The decree must be affirmed, with costs.

The other Justices concurred.

Rachel M. Clark v. Eli Stilson and others; and Eli Stilson and another v. Rachel M. Clark.

Contract: Construction: Mortgage: Agreement to release in part. A person holding a mortgage covering two parcels of land having contracted with his mortgagor that as soon as he should receive deeds of the parcels covered by his mortgage he would convey to the mortgagor's wife one of said parcels, the mortgagor to retain possession of the other parcel until such time as the mortgagee sells the same, and to pay the mortgagee interest at the rate of ten per cent. on an amount equal to the face of the mortgage, from the time of the conveyance to his wife of the one parcel until the sale by the mortgagee of the other, it is held to be a fair inference from this agreement, that the parties contracted in contemplation that a foreclosure should be had, and that in consideration of the change made in the form of security, the mortgagee was to release from the lien of the mortgage the portion of the land promised to be conveyed to the mortgagor's wife.

Foreclosures: Sale in parcels: Right to redeem: Waiver. The requirement that a foreclosure sale shall be made in parcels is in the interest of parties entitled to redeem, and to protect their right to redeem each parcel separately; but where a party has in advance for a valuable consideration agreed to waive his right to redeem, he cannot object that the sale was not made in parcels; and this objection cannot be taken by the mortgagee to his own proceedings, where no one else is in position to make it.

Mortgages: Contract: Amicable arrangement: Defective foreclosure: Costs of new foreclosure. A mortgagee having entered into such a contract with his mortgagor, if after a defective foreclosure he should deem it important for any purpose of his own to proceed to a new foreclosure for the correction of any error in his own proceedings, he could neither legally nor equitably charge his mortgagor with the expense thereof.

Vendor's lien: Judgment: Amount: Execution sale: Release. Where a person claiming to have a vendor's lien upon lands has mingled his claim for purchase money with a claim for the price of personal property, in a single judgment, in such manner as to render it impossible to determine how much of the judgment represents the price of the land and

CLARK v. STILSON.

how much the value of personal property, and under this judgment proceeded to execution levy and sale of the premises in question, his lien as vendor for the unpaid purchase money is lost.

Vendor's lien: Equitable mortgage: Execution sale. A vendor's lien is in the nature of an equitable mortgage; and under the statute (*Comp. L. 1871, § 4687*) the equity of redemption cannot be sold on execution for the satisfaction of the mortgage debt; and an execution sale of the premises upon a judgment for the purchase price would seem to negative the claim of lien.

Execution sale: Purchaser's title. An execution purchaser can obtain no better right than the judgment debtor had at the time of the levy.

Heard April 13 and 18. Decided June 6.

Appeal in Chancery from Kalamazoo Circuit.

Russell & Wadleigh and G. M. Buck, for complainant.

Edwards & Sherwood, for defendants Stilson.

Arthur Brown, for defendant Sebring.

COOLEY, CH. J:

This is a suit by the administrator of Amasa L. Clark to foreclose a mortgage given to him by the defendant Eli Stilson and his wife. The defendant Sebring is brought in as claiming an interest in one of the two parcels of land described in the mortgage, as subsequent incumbrancer, purchaser or otherwise.

The defendants Stilson and Sebring set up separate defenses, and the latter has filed a cross-bill. The defense of each may best be considered separately.

The mortgage was for the sum of two thousand dollars, and bore date February 8, 1869. On the 2d day of March, 1872, Stilson claims to have made an agreement with Clark, by which the latter was to proceed to foreclose his mortgage and obtain title under it, and then to take one of the two parcels of land in satisfaction, conveying the other to Mrs. Stilson. He, however, demanded two hundred and fifty dollars as a bonus for doing this, which Stilson avers he paid; and he was also to leave the land he should take in the possession of Stilson, who was to pay what in the agreement was called interest, and which we understand was in fact equal to ten per centum annually on the amount then

CLARK v. STILSON.

owing from Stilson to Clark. As evidence of this agreement, Stilson produced the following instrument:

"Article of agreement this 2d day of March, 1872, between Amasa L. Clark of the city of Battle Creek, Calhoun county, Mich., of the first part, and Eli Stilson of Ross, Kalamazoo county, Mich., of the second part. The said party of the first part does hereby agree that as soon as he shall receive deeds of the lots of land in Ross, Kalamazoo county, Mich., described as follows: Being the west half of the northeast quarter of section number twenty-four, in township number one south of range number nine west, containing eighty acres, and the one described as the north half of the southeast quarter of section thirteen, in town one south of range nine west, containing eighty acres, that he will convey to Emeline Stilson, by good warranty conveyance, the lot described as follows: The west half of the northeast quarter of section number twenty-four, in township number one south of range number nine west, containing eighty acres. The said party of the second part agrees to pay to the party of the first part interest on twenty-six hundred dollars at ten per cent. per annum from the time the deed is conveyed to Emeline Stilson until such time as he shall sell the lot described as follows: The north half of the southeast quarter of section thirteen in town one south of range nine west, containing eighty acres; it being mutually understood by and between said parties that the said party of the second part is to have possession of the lot last described, until such time as said party of the first part shall sell it.

"It is agreed that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties. In witness whereof the said parties have hereunto set their hands and seals the day and year first above mentioned.

"A. L. CLARK,

"ELI STILSON.

"In presence of

"JAMES T. ALEXANDER,

"CHAUNCEY WEBSTER."

CLARK v. STILSON.

Some criticism is made on the evidence produced to prove this instrument, but we think it was sufficient. The agreement is somewhat vague in some of its provisions, and does not expressly mention the mortgage; but when the position of the parties in respect to the land described in it is shown, the difficulties disappear. Clark was to perfect his title by obtaining deeds to the two parcels of land, and then convey one of them to Mrs. Stilson. Now a mortgagee obtains deeds of the lands mortgaged to him and perfects his title by foreclosure; and it is a fair inference from this agreement that the parties contracted in contemplation that a foreclosure should be had. When it was completed and one parcel of the land had been conveyed to Mrs. Stilson, Clark would remain the nominal owner of the other. Whether it was understood that he should be real owner of an absolute fee, or, on the other hand, should only hold this parcel in pledge, we need not inquire, as in any event the parcel conveyed to Mrs. Stilson would be wholly released from any lien; and that is all that is important here. But the stipulation that he should receive interest on his demand until the parcel retained by him should be sold, tends strongly to indicate an understanding that, in consideration of the change made in the form of the security, Clark merely released a portion of the land from the lien of his mortgage.

Subsequent to this agreement Clark proceeded to a statutory foreclosure of his mortgage, and the lands were struck off to him and a deed given. It is now said that the sale was void under the decision in *Lee v. Mason*, 10 Mich., 403, because the two parcels of land were sold together for one gross sum. This being so, it is argued that Clark never perfected his title. This would certainly be true as to any third party who might have been owner of any lien upon or interest in the land; but it is not so clear that such would be the effect as to either Clark or Stilson. The requirement that the sale shall be made in parcels, is in the interest of the party or parties entitled to redeem, and to protect their right to redeem each parcel separately; but if

CLARK v. STILSON.

a party shall in advance, for valuable consideration, waive his right to redeem, it is plain, we think, that he could not rely upon this objection. Neither could the mortgagee make this objection to his own proceedings, where no one else was in position to make it. And we think that was the effect of the arrangement between Clark and Stilson; it did not contemplate any redemption; and a strict compliance with the law for the protection of a right to redeem, when under their agreement none was to take place, was of no consequence to either. It was certainly of no importance to any third person having no interest in the land. If, however, Clark, after a defective foreclosure, deemed it important for any purpose of his own to proceed to a new foreclosure for the correction of any error in his own proceedings, we see no ground on which he could legally or equitably charge the Stilson with the expense. Mrs. Stilson was entitled to the stipulated conveyance as soon as Clark's deed on the foreclosure by advertisement became absolute according to its terms; and any foreclosure proceedings afterwards could affect only the other parcel; probably on the concession that Clark held that parcel in pledge only, he might proceed to a foreclosure at any time.

Sebring's defense is based upon a supposed vendor's lien, upon the parcel of land on section thirteen. It is conceded that Stilson purchased this land of Sebring, and the purchase price has never been fully paid. December 19th, 1871, Sebring obtained a judgment against Stilson for one thousand three hundred and twenty-four dollars, which is supposed to embrace the balance of this purchase price. The judgment was obtained in a suit in which not only was the purchase price of the land counted on, but also the value of personal property to the amount of one thousand dollars or so. By virtue of an execution upon this judgment, the parcel on section thirteen was levied upon and sold to Sebring, after Clark had sold under the foreclosure at law. The sum at which the sale was made to Sebring was eight hundred dollars, and this now represents the lien,

CLARK v. STILSON.

if it exists at all. But as it is impossible for us to know how much of the judgment represents the price of land, and how much the value of personal property, it is also impossible to support a lien on the idea that it is represented by the judgment. The confusion of demands in the suit, and in the judgment, renders a distinction at this time wholly impracticable. And there is still a further difficulty, namely, that the sale on execution was inconsistent with any claim of lien. A vendor's lien is in the nature of an equitable mortgage; and our statute does not permit the equity of redemption to be sold on execution for the satisfaction of the mortgage debt.—*Comp. L. § 4667*. The sale thereof would seem to negative the claim of lien.

Our conclusion is, that the only relief which complainant could have been entitled to was a decree for the sale of the lot on section thirteen. Sebring's purchase of this lot on his execution was not paramount, but subordinate, to the right of Clark to realize his debt from that lot, since Sebring by his purchase could obtain no better right than Stilson himself had, and Stilson's title we find to have been subject to a lien for that debt. The decree in accordance with these views must be so drawn as to protect the rights of Mrs. Stilson in the other lot, and she should recover her costs of both courts. As against Sebring, the complainant is entitled to costs.

The other Justices concurred.

Jonathan Palmer v. Frank J. Palmer.

Promissory notes: Payable thirty days after demand: Statute of limitations

A note payable on demand is payable at once and without demand, so that the statute of limitations runs from its delivery; and this rule has been applied where from the form of the contract it was manifest immediate payment was not expected; and a note payable thirty days after demand is within the same principle.

PALMER v. PALMER.

Demand: Statute of limitations: Delay. Where a demand is necessary to found an action upon, the demand is barred unless made within the period of the statute of limitations, and the right of action is extinguished by the delay.

Statutes of limitation: Construction: When cause of action accrues. Whatever may have been the prejudice formerly against statutes of limitation, they are now regarded as just and entitled to be fairly construed; and the cause of action should be held to accrue for the purpose of setting the statute in motion, at least where no delay is contemplated, as soon as the creditor by his own act and in spite of the debtor can make the demand payable.

Submitted on briefs April 18. Decided June 6.

Case made from Genesee Circuit.

W. Newton, for plaintiff, argued that there was no law to restrain or forbid a party from making contracts payable in the future upon the happening of an event; and that a note or contract may be made payable when a certain event may occur in the future, however remote: *Sword v. Keith*, 31 Mich., 247; *Kimball v. Kimball*, 16 Mich., 211; *Jilson v. Gilbert*, 7 Am., 100; *Payne v. Gardiner*, 29 N. Y., 146. The note in suit is not a demand note, payable on demand, but a note that fixes a period of thirty days, after an actual demand, before it becomes due; and until the expiration of that time after demand in fact, no right of action accrued, no interest was borne, and no suit was maintainable: 2 *Parsons on Notes & Bills*, 644, and cases. It is like a note payable at a given period after notice, in which case notice must be given and then the additional period must elapse before the statute begins to run: *Clayton v. Gosling*, 5 B. & C., 360; *Norton v. Ellam*, 2 M. & W., 461. Notes payable on demand are due immediately; but the rule is different where a note is payable a certain time after demand: *Cornell v. Moulton*, 3 Dento, 12; *Norton v. Ellam*, *supra*; *Thompson v. Ketchum*, 8 Johns., 190, 374. As between maker and payee, where the rights of endorsers are not involved, the question of diligence in presenting the paper and demanding payment does not arise. No such question exists here. No injury accrued to the maker; he was not liable to pay interest until thirty days after demand of payment, and there is nothing in the contract that bound the holder to present it at any particular time, or within any specified number of years.

A. C. Baldwin, for defendant.

The theory of defendant is, that as this note was without interest, a demand must be made in a reasonable time after the giving of the note, and if more than six years elapsed

PALMER v. PALMER.

after the expiration of the thirty days, the statute would operate and would bar a recovery. Two old English cases are against this proposition. For the first, however (*Holmes v. Kerrison*, 2 Taunt., 323), no reasons are given; and it was in an inferior court, and the whole bench did not take part. The other (*Thorpe v. Booth, R. & M.*, 388) was decided on the authority of the previous one, the court saying: "This is certainly a point of some doubt and difficulty." These cases ought not to be considered of very great authority.

Payne v. Gardiner, 29 N. Y., 146, is largely relied upon by plaintiff's counsel; but there is nothing in it particularly applicable to this case. It was considered at great length, and the opinion given by a divided court. As this case was properly decided for the plaintiff upon other grounds than the necessity of a demand, and three of the judges hold no demand was necessary, the case has as great a bearing for us as for our adversaries.

Statutes of limitation are founded on sound policy, are statutes of repose, and are not to be evaded by construction: *Roberts v. Pillow*, Hempst., 624; *Philip v. Pope*, 10 B. Mon., 163; *Dickerson v. McCarny*, 5 Geo., 486; *McCarthy v. White*, 21 Cal., 495; and should be regarded with favor by courts of justice, and should be so construed as to advance the policy they were designed to promote: *Gautier v. Franklin*, 1 Tex., 732. The law presumes when the paper does not draw interest that a demand will be made in a reasonable time. Reference is also made to *Stamford v. Tuttle*, 4 Vt., 87; *Collard's Admr. v. Tuttle*, 4 Vt., 492; *Jones v. Eisler*, 3 Kans., 134; 39 Me., 492; *Codman v. Rogers*, 10 Pick., 119, as sustaining defendant's proposition.

What is to be considered a reasonable time for making demand in such cases does not appear to be settled by any precise rule; it must depend upon circumstances. If no cause for delay can be shown, it would seem reasonable to require demand to be made within the time limited by the statute for bringing the action. There is the same reason for hastening the demand that there is for hastening the commencement of the action; and in both cases the same presumptions arise from delay.

CAMPBELL, J :

The only question in this case is, whether a certain promissory note, not negotiable, given by the defendant to plain-

PALMER v. PALMER.

tiff, was barred by the statute of limitations when suit was begun.

The note was in the following terms:

“\$1,500.

ATLAS, MICH., Oct. 16, 1867.

“Thirty days after demand, I promise to pay Jonathan Palmer fifteen hundred dollars, value received, without defalcation.

FRANK J. PALMER.”

No demand is found to have been made until May 22d, 1874, or six years and seven months after date. An attempt was made to show a previous demand by showing the transmission by mail of a letter from the cashier of a bank to whom the paper had been sent in July, 1873. This notice is not found to have reached defendant, and it contained nothing to indicate the identity or ownership of the note. The court below found against it.

Although some evidence is set forth in the finding, which seems to have been inserted at the request of counsel, and which may possibly have had some bearing upon the consideration of the note, yet no finding is based upon it. The only pertinent facts found at all are the making and non-payment of the note, and the demand made in 1874.

The court found that the suit was not barred. This conclusion was based on the theory that until demand made no action accrued; and that as the time limited by the statute runs from the time when action accrues, it did not begin to run until thirty days after May 22d, 1874, from which date interest was allowed.

Taking this note as it reads, and as it is established by the finding, being payable without interest, it is impossible to assume that it was intended to run for any considerable time. The fair inference is, that it was given for some debt or other consideration on which an immediate liability existed, which the maker of the note expected to be ready to meet on reasonable notice, which was fixed at thirty days. If the note had been negotiable, and endorsed over, any long delay to present it would unquestionably have released the endorser.

PALMER v. PALMER.

If the judgment is correct, it can only be so because, by the terms of the contract the holder had a right to postpone the maturity of the debt as long as he chose to do so. For if the debt did not become payable until fixed by demand, and the demand was optional with the creditor, no tender could be made which would bind him, and he could keep the debt alive in spite of the debtor, for an indefinite period. If there was any infirmity in the consideration, or any defect in the binding character of the obligation, he might retain it until all testimony was lost, and defeat the defense. This is the mischief which the statutes of limitation were intended to remedy. If this case is not within them, it is not because it ought not to be covered by them.

It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where from the form of the contract it is manifest that immediate payment was not expected. Thus in *Norton v. Ellam*, 2 M. & W., 461, the note called for interest, which indicated at least an expectation of some delay. In *Howland v. Edmonds*, 24 N. Y., 307, the premium capital notes of a mutual insurance company, payable "in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require," were held to stand on the same footing with ordinary demand notes, so that the statute began to run from date. In *Waters v. Thanet*, 2 A. & E., N. S., 757, a party had promised to pay the amount of certain dishonored bills "when-ever my circumstances may enable me to do so, and I may be called upon for that purpose." This promise was made in 1803. An action was begun in 1838, less than six years after demand, and within a year after the plaintiff had learned of defendant's having become solvent through inheritances. It appeared, however, that he had actually become able to pay in 1825, and the court held the statute ran from such ability, without demand. A similar decision was made in *Jones v. Eisler*, 3 Kansas, 134, where the note was payable

PALMER v. PALMER.

when the maker received a payment from government, or as soon as otherwise convenient. The statute was held to run after a reasonable time, which there was held on the facts to have been not later than sixty days. In *Emery v. Day, 1 C. M. & R., 245*, a contract was made for work payable out of a public fund to be provided, but it was held the statute began to run from the time the work was completed, although the fund was not raised until some time thereafter.

If this question depends upon any reasonable principle it is impossible to find any ground for holding notes payable on demand as setting the statute running at once, which would not make the note in the present case barred in six years after the expiration of thirty days. The payee could have presented it at any time, and it is not the design of the statute to put it in the power of the creditor to postpone its application at his own pleasure.

Such notes are very rarely given. It is quite common to make bills of exchange payable at or after sight. But the drawer and endorsers are discharged by any considerable delay. It is one of the legal conditions of such paper that there shall be a speedy presentment. Why a different rule should be applied to a note is not evident.

There are not more than half a dozen cases, if so many, in which this form of note has been passed upon directly. In *Holmes v. Kerrison, 2 Taunt., 323*, it was held that a note payable after sight was not barred until six years after it had been presented for payment. And in *Thorpe v. Booth, Ryan & Moody, 388*, upon the authority of that decision, a note dated March 12th, 1813, payable twenty-four months after demand, and not demanded until June 28th, 1823, was held not barred. In *Holmes v. Kerrison* the case is put, without further reasoning, upon the ground that no action could have been brought until after presentment, and *Thorpe v. Booth* contains no reasoning at all. While these decisions seem to have settled the practice in England, no subsequent case, so far as we have been in-

PALMER v. PALMER.

formed, seems to have affirmed or vindicated them in any direct way, although they are probaly adhered to. But so far as their principle is involved, it has been departed from to some extent at least.

In *Webster v. Kirk*, 9 E. L. & Eq., 408, it was held that a payee who had been sued by a subsequent holder of a dishonored bill could not in turn sue the drawer more than six years after the dishonor of the paper, although a much less time had elapsed since his own liability had been enforced. It was urged that the payee could not sue on a note which he did not hold, and that no action therefor accrued to him until he was damnified. But the court of Queen's Bench held nevertheless that the statute ran from the dishonor. This could only have been upon the ground that any of the parties might have taken up the paper and thus obtained a right of action. In *Clayton v. Gosling*, 5 B. & C., 360, a note payable twelve months after notice had not been presented before the maker went into bankruptcy. The question came up whether it was provable under the commission as an existing debt due, and it was held provable. The court, however, placed the decision upon the ground that inasmuch as the note contained the words "for value received," it was an admission of an existing debt, and might be regarded as security for it. This is a far-fetched reason, which shows how far it was deemed proper to go to prevent a failure of justice.

In the United States there have been some incidental recognitions of the doctrine of *Holmes v. Kerrison*. *Thrall v. Mead*, 40 Vt., 540, *Stanton v. Estate of Stanton*, 37 Vt., 411, and *Wolfe v. Whiteman*, 4 Harrington, 246, appear to adopt it.

In New York there are dicta to the same effect in *Wenman v. Mohawk Ins. Co.*, 13 Wend., 267, and *Bruce v. Tilson*, 25 N. Y., 194, and *Howland v. Edmonds*, before cited. No such point arose in any of these cases, and the actual decision in each of them is, in our opinion, difficult to harmonize with any such principle.

PALMER v. PALMER.

In *Morrison v. Mullin*, 34 Penn. St., 12, it was held that where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay.

We cannot but think this to be sound doctrine; whatever may have been the ancient prejudice against statutes of limitation they are now regarded as just and entitled to be fairly construed. If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract, and where a speedy demand would manifestly violate its intent. But where no delay is contemplated the rule is just and reasonable; and the presentment should be reasonably prompt, or the creditor should be subjected to the operation of the statute.

The judgment must be reversed, and judgment entered for the defendant on the finding, with costs of both courts.

The other Justices concurred.

Samuel A. Tripp and another v. Frederick W. Curtenius and others.

Certificates of deposit: Promissory notes: Payable on demand. A certificate of deposit, payable on the return thereof properly endorsed, is in legal effect a promissory note, payable on demand; and the principles applicable to such notes should be applied to these certificates.

TRIPP v. CURTENIUS.

Certificates of deposit: Certified checks: Lapse of time: Past due. The argument that a certificate of deposit and a certified check are in legal sense the same thing, are governed by the same rules, and that no mere lapse of time will render such check or certificate past due or dishonored, is held not well founded.

Certificates of deposit: Demand paper: Bank bills. Certificates of deposit are not intended for long circulation, or for more than a temporary convenience, and to hold that any ostensibly demand paper could be circulated or used as bank bills, would be contrary to the general policy of our banking laws.

Statute of limitations: Demand paper: Bona fide purchaser: Past due. Upon all demand paper not excepted by the statute (*Comp. L., 1871, § 7151*) from the provisions of the statute of limitations, the time runs from the beginning, without any special demand, and no one can become a *bona fide* purchaser who does not take it within some reasonably short period; to hold otherwise would enable banks to issue certificates of deposit, of any denomination, for circulation as ordinary bank bills, and with like effect.

Certificates of deposit: Promissory notes: Demand paper. These certificates being in legal effect promissory notes payable on demand, to refuse to apply the principles governing such notes, either because of the peculiar form of the instrument, or because issued by a firm engaged in the business of banking, would be to create a distinction unsound in principle and not warranted by any reason or necessity.

Heard April 18. Decided June 6.

Error to Kalamazoo Circuit.

Severens, Boudeman & Turner, for plaintiffs in error.

The instrument sued upon contains all the elements of a promissory note and is in legal effect a promissory note payable on demand. It would be overdue after the lapse of a reasonable time; and any person taking it after such reasonable time had elapsed would take it the same as any other overdue paper, subject to the equities between the parties; and the payments and set-offs of defendants should have been allowed. And they cited: 2 *Daniels on Neg. Inst.*, 601; *Poorman v. Mills*, 4 Cal., 354; *Brummagin v. Tallant*, 29 Id., 506; *Coye v. Palmer*, 29 Id., 159; *Wilton v. Adams*, 39 Id., 37; *Howe v. Haskness*, 11 Ohio St., 449; *Bank of Peru v. Farnsworth*, 18 Ill., 563; *Carey v. McDonald*, 7 Ga., 84; *Cate v. Patterson*, 25 Mich., 191; *Miller v. McClelland*, 13 How. Pr., 218; *Levell v. Palmer*, 3 N. Y., 357; *Curtis v. Levell*, 15 N. Y., 263; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Palmer v. Adams*, 17 Barb., 386; *Kilgore v. Buckley*, 14 Conn., 362; *Losee v. Dunkin*, 7 Johns., 69; *Furman v. Haskins*, 2 Caines, 369; *Loomis v. Pulver*, 9 Johns., 244; *Sice v. Cunningham*, 1 Cow., 397; *Bank of Utica v. Smeades*, 3 Id., 662; *Herrick v. Woolveston*, 41 N. Y., 581; *Morey v. Wakefield*, 41 Vt., 24; *Nevins v. Townsend*, 6 Conn., 5; *Parker v. Tuttle*, 44 Me., 459; *Sylvester v. Crapo*, 15 Pick., 92; *Carlton v.*

TRIFF V. CURTENIUS.

Bailey, 27 N. H., 230; *Camp v. Clark*, 14 Vt., 387; *Carl v. Brown*, 2 Mich., 401.

Arthur Brown, for defendants in error.

Defendants after issuing such a certificate are estopped to deny its truth; they cannot contradict their written contract that the amount of money was deposited thus certified by them: *First National Bank, etc., v. Leach*, 52 N. J., 350. Such certificate when issued becomes like a bank bill, the representative of so much money, and circulates from hand to hand in a like manner. Like bills of issue they are promissory notes for the purpose of bringing suit upon them: *Cate v. Patterson*, 25 Mich., 191. But it does not necessarily follow that they are subject to the same rules as to demand and as to the time when they fall due. It may well be that as between private individuals a promissory note payable on demand should be presented promptly, and yet if money is deposited in a bank no inference of dishonor can be drawn from the fact that it is left there a long time. It is the business of the institution to keep money on deposit, and the holder would not be likely to present it as quickly as between private persons. The certificate of deposit and the certified check are in legal sense the same thing and are governed by the same rules: *Merchant's Bank v. State Bank*, 10 Wall., 648; 2 *Daniels on Bills & Notes*, 1603. No mere lapse of time will render such a check or certificate past due and dishonored: *Girard Bank v. Bank of Penn Township*, 39 Penn. St., 92; *Willets v. Phoenix Bank* 2 Duer, 121; *F. & M. Bank v. B. & D. Bank*, 4 Kern., 624; *Smith v. Müller*, 43 N. Y., 176; *Meads v. Merch. Bank*, 25 N. Y., 147; 1 *Parsons on N. & B.*, 273, and note.

Payment to the original payee before a note is due, cannot affect a subsequent holder: 1 *Parsons on N. & B.*, 280; 2 *Id.*, 230. A holder of a note payable on demand, without actual notice of demand, is a *bona fide* holder before maturity, and takes the paper free of all equities: 1 *Parsons on N. & B.*, 270; *Field v. Nickerson*, 13 Mass., 131. No objection was made to defendants showing, if they could, that plaintiffs or those through whom they claimed were not *bona fide* holders, and witnesses were examined on that subject.

MARSTON, J:

Plaintiffs in error, as co-partners, engaged in the business of banking, on the 22d of October, 1873, issued a certificate, of which the following is a copy:

TRIPP v. CURTENIUS.

"Certificate of deposit. Not subject to check, and no interest."

"\$800.

S. A. TRIPP & Co., BANKERS, }
"South Haven, Mich., Oct. 22, 1873. }

"Daniel Howard has deposited in this bank eight hundred dollars, payable to the order of himself, in current funds, on the return of this certificate properly endorsed.

"No. 265. \$800.

"S. A. TRIPP & Co."

Howard endorsed this certificate and transferred it to B. H. Dyckman, who, being indebted to the defendants in error, bankers at Kalamazoo, delivered to them this certificate to apply upon his indebtedness, shortly prior to February 14, 1876. The certificate was presented for payment February 14th, 1876, and payment refused, and an action was commenced March 10th following to recover the amount thereof.

Upon the trial counsel for plaintiffs in error offered to prove that four hundred and sixty-two dollars and six cents had been paid upon this certificate at or about the time it was issued, leaving a balance which had afterwards been tendered to Dyckman while he held it, and since then paid into court. This evidence was objected to, principally upon the ground that the plaintiffs below were *bona fide* holders. The objection was sustained and judgment rendered for the whole amount of the certificate.

In *Cate v. Patterson*, 25 Mich., 191, it was held that a certificate of deposit, similar to the one issued in this case, contained all the elements necessary to constitute, and was in legal effect a promissory note, and such is the undoubted weight of authority, as will appear from the cases collected and cited in the brief for plaintiffs in error.

This being the case, it is difficult to see why the principles applicable to promissory notes, payable on demand, should not apply to this class of paper. It is but a promise to pay money on demand, without interest, which indicates an intention to leave it on deposit but for a short period. It is argued that a certificate of deposit and a certified

TRIPP v. CURTENIUS.

check are in legal sense the same thing, are governed by the same rules, and that no mere lapse of time will render such check or certificate past due or dishonored.

The authorities cited to sustain this view are *Willeys v. Phoenix Bank*, 2 Duer, 121; *F. & M. Bank v. B. & D. Bank*, 4 Kern., 624; *Smith v. Miller*, 43 N. Y., 176; *Meads v. Merchants' Bank*, 25 N. Y., 147; *Merchants' Bank v. State Bank*, 10 Wall, 648; and *Girard Bank v. Bank of Penn.*, 39 Penn. St., 92.

In these cases the court in discussing the legal qualities and effect of a certified check, likened it to a certificate of deposit, and held, that a check, when certified good by a bank, cannot be dishonored by lapse of time alone; that the bank, when it so certifies a check, at once charges the amount thereof up to the drawer on his account, and that funds are retained from that time by the bank to meet such check. Upon a very careful examination we were able to find but one case where the question came up directly upon a certificate of deposit. In the case of *The National Bank of Ft. Edward v. Washington Co. National Bank*, 5 Hun, 605, it was held that where a bank issues a certificate of deposit, payable on its return properly endorsed, it is liable thereon to a *bona fide* holder, to whom it was transferred seven years after its issue, notwithstanding a payment thereof to the original holder; that such a certificate was not dishonored until presented. The reasoning in this case is not very satisfactory, the court laying stress apparently upon the fact that the certificate is payable only upon its return, and also the fact that it was issued by a bank.

The first argument is equally applicable to a promissory note. Such paper is properly payable only upon presentation and return, and the mere fact that the instrument is issued by an individual, copartnership or corporation engaged in the banking business, cannot, in our opinion, or at least should not, make any difference. Certificates of deposit are not intended for long circulation, or for more than a temporary convenience, and as a substitute for a draft or a

TRIPP v. CURTENIUS.

certified check; and to hold that any ostensibly demand paper could be circulated and used as bank bills, would be contrary to the general policy of our banking laws. Bank bills, notes, or other evidences of debt issued by any bank, are excepted from the provisions of our statute relating to the limitation of actions.—§ 7151, *C. L.* The notes here referred to are the circulating notes, in the similitude of bank notes, of the different denominations authorized to be issued under our general banking law, and would not include certificates of deposit,—*Comp. L.*, § 2192; while the other evidences of debt has reference to the ordinary deposits which are like a running account, on which the time of limitation only begins when there is a special occasion for making a new departure. But upon all demand paper not excepted by the statute, the time runs from the beginning, and no one can become a *bona fide* purchaser who does not take it within some reasonably short period. To hold otherwise, would enable banks to issue certificates of deposit, of any denomination, for circulation as ordinary bank bills, and with a like effect.

In *Brummagin v. Tallant*, 29 *Cal.*, 503, it was held that the statute of limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and that no special demand is necessary to put the statute in motion. We think this is the safer and better doctrine, and is correct in principle. To hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principles applicable to demand promissory notes, either because of the peculiar form of the instrument, or because issued by a firm engaged in the business of banking, would be to create a distinction unsound in principle and one not warranted by any reason or necessity that we can discover.

The judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

RANDALL V. JUDGE OF WAYNE CIRCUIT.

**The People on the relation of James A. Randall v.
The Judge of the Wayne Circuit.**

Order to hold to bail vacated: Requiring defendant to enter appearance: Discretion. Where on defendant's motion, an order to hold to bail is vacated, it is within the discretion of the circuit judge, as a part of the order vacating the same, to require defendant to enter his appearance in the cause.

Heard June 5. Decided June 6.

Application for Mandamus.

Baker & Thompson, for the relator, applied *ex parte* for an order to show cause.

THE COURT held that where on motion of the defendant, an order to hold to bail is vacated, it is within the discretion of the circuit judge, as a part of the order vacating the same, to require the defendant to enter his appearance in the cause.

Order to show cause denied.

**The People on the relation of Charles F. Campau v.
The Probate Judge of St. Joseph County.**

Mandamus: Petition for administration: Probate court: Remedy. Mandamus will not lie to review the refusal of a probate court to grant letters of administration on an estate of a decedent.

Heard June 5. Decided June 6.

Application for Mandamus.

C. J. Beerstecher, for relator.

No counsel appeared for respondent.

CAMPAU v. PROBATE JUDGE OF ST. JOSEPH COUNTY.

PER CURIAM:

The relator had applied for letters of administration on an estate, and his application appeared to make out a satisfactory case. On the hearing, the probate judge denied it.

Held, That if there was any error in this denial, the relator could not correct it by this proceeding.

Writ denied.

Henry J. Brownell v. Keziah M. Groesbeck.

Hearsay evidence: Ex parte presentation: Practice. It appearing that hearsay evidence was admitted against objection, and the case not having been argued for defendant in error, the judgment is reversed for the erroneous admission of the hearsay evidence, and the other questions raised are not considered.

Heard June 5. Decided June 6.

Error to Kalamazoo Circuit.

May, Buck & Powers, for plaintiff in error.

No counsel appeared for defendant in error.

PER CURIAM:

This case was not argued on the part of the defendant in error.

It clearly appears that hearsay evidence was admitted under objection, and for this the judgment must be reversed. Some other questions appear in the record, but we prefer, in the absence of any necessity for doing so, not to consider them on an *ex parte* presentation.

Judgment reversed, with costs, and a new trial ordered.

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

Hartford Fire Insurance Company v. James S. Reynolds.

Charge to the jury: Error cured. Where the jury's attention is strictly confined to questions depending wholly on the facts alleged in a particular count of the declaration, the error of refusing to charge that there can be no recovery except under that count, is cured.

Competency of witness. The judge determines a witness' competency unless it depends on a disputed question of evidence, which he may refer to the jury.

Disclosures to an attorney in the presence of an outside party are not privileged; and where the client has himself testified as to conversations with his attorney, it seems this may operate as a waiver of the privilege to that extent.

Agency: Brokerage. So far as an insurance agent acts as an insurance broker, he is agent for the insured and not the insurer.

Notice and return of premium to insurance agent. Where the same person is at once agent for the insurance company and for the policy-holder, the latter is bound by notice to the agent of the cancellation of his policy, and by the return or credit of the premium to the agent.

Revivor of cancelled policy by insurance agent. An agent of an insurance company cannot revive a cancelled policy already rejected by the company, unless he has their authority to rescind or revoke their action, and that, too, in the specific case; this authority cannot be presumed.

Insurance company not bound by agent's acts done outside of the agency. An insurance agent having agreed with A to look after his risks in the company which he represented and in various others, reported lists to him showing the amount of his insurances therein, and gave him a receipt for money advanced to pay premiums:—

Held, In an action by A against the company represented by the agent, that as these papers were merely drawn up for A's information, by a person acting therein as his agent, and not in the course of any agency for the company, they were inadmissible to show any recognition by the company of the policy on which suit was brought.

Charge to the jury: Conversation: Statements of plaintiff. A witness having testified to a conversation with plaintiff, wherein the latter made statements inconsistent with the rights he set up in his suit, and which, if true, precluded his recovery on his own theory, and this testimony being corroborated by other evidence, the refusal to charge, as requested, that if such a conversation as testified to was held, the plaintiff could not recover, is held error, in the absence of any equivalent charge.

Heard April 6. Decided June 12.

Error to Washtenaw Circuit.

Ashley Pond, for plaintiff in error, to the point that the competency of a witness is a question for the judge, and not for the jury, cited: *Harris v. Wilson*, 7 Wend., 57; *Commercial Bank v. Hughes*, 17 Wend., 94; *Cook v. Mix*, 11 Conn., 432; *Reynolds v.*

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

Lounsbury, 6 Hill, 534; Halcomb v. Halcomb, 28 Conn., 177; Reg. v. Hill, 5 Eng. L. & E., 547; Naves v. Williams, 22 Ind., 368; Campbell v. State, 23 Ala., 44; Wühauer v. Latham, 12 Conn., 392; Chottau v. Searcy, 8 Mo., 788. Contra, Bartlett v. Howitt, 33 N. H., 131; Hays v. Hunsicker, 26 Penn. St., 58.

Beakes & Cutcheon, for defendant in error.

CAMPBELL, J:

Suit was brought and recovery obtained on a policy of insurance alleged to have been in force at the time of the destruction of certain mill property of defendant in error in August, 1874.

There were several counts in the declaration, and among other things it is claimed the court erred in refusing to charge that there could be no recovery except under the first count, which was for a renewal of a policy which had expired on the 2d day of April, 1874, by its extension for one year, including the engines and boilers, which were not covered by the original policy.

We think that as the case was left to the jury, this instruction was in fact given, inasmuch as their attention was strictly confined to questions depending entirely on the existence and validity of the renewal agreement. The important questions in the case arise out of other matters of more direct bearing on the merits.

Another objection is perhaps proper to be considered by itself, namely, the rulings concerning the testimony of the witness Hewitt, whose statements were in part ruled out originally, and in part left to the jury to receive or reject, as relating to privileged communications between attorney and client.

After the fire, Mr. Hewitt was employed to prepare the proofs of loss, and seems to have had some other work to do in hunting up the documents and making inquiries. It is difficult from the record to determine,—supposing him to have been a professional adviser,—precisely what part of the transactions came within professional privilege. Hewitt and

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

Reynolds were directly at variance concerning the existence of the relation at all, during some part of the occurrences. The court excluded some matters and received some matters during Hewitt's examination. In the charge it was left to the jury to exclude his testimony of interviews entirely, if they were satisfied from the evidence before them that the conversations took place while Hewitt was Reynolds' attorney.

We do not think it improper to leave to the jury the question of the existence of such a relation when disputed. The judge may determine upon the statements of a witness himself whether he is competent or not; but it does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict. And it has been held that on an intricate question of fact the jury may very properly be consulted.—1 *Edw. Ph. Ev.*, 4. We understand this to be correct practice, and in many cases to be the only safe rule for determining such questions. It is laid down very plainly by *Greenleaf*.—1 *Gr. Ev.*, §§ 49, 425.

But in the present case, we think too large a range of exclusion was left to the jury. They were left at liberty to exclude all the conversations between Reynolds and Hewitt during the period of the professional employment. There was room to claim that all of their intercourse was not privileged or confidential, and some testimony was given by the plaintiff himself, concerning what took place between them, which might possibly be at least a partial waiver of the privilege as to the occasions referred to. At one of the principal meetings Mr. Case was present and took part in the deliberations, which could not, therefore, be regarded as within professional confidence. The judge undoubtedly did not intend to shut out any but confidential matters, and the failure to define them was probably inadvertent.

The principal controversy arose concerning the existence of the renewal of the policy. The evidence was uncontradicted that the insurance company held it cancelled in May, 1874. It was returned to them by their orders, from the

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

agent, Kirchhofer, who had countersigned it, but who had always kept it in his custody for Reynolds. The contest, therefore, was as to whether this cancellation was operative or not as against Reynolds. He claimed to have paid the premium, and to have received no notice of cancellation.

It is necessary, therefore, to know something of the surroundings of the case. Reynolds owned a valuable mill property in Manchester, where Kirchhofer and he resided. He kept up a large insurance, amounting with that in dispute to about thirty thousand dollars. Of this, twenty thousand dollars was obtained of companies for which Kirchhofer was agent. An arrangement existed between them whereby, in consideration of dealing with Kirchhofer, Reynolds was to have an abatement of five per cent. out of the premiums, to be allowed out of Kirchhofer's commissions. The latter also gave him time on his payments of premiums, and did not exact cash down.

There was evidence also of a further understanding that Kirchhofer should look after the insurances and see to their renewal; and that Reynolds left the whole custody and care of the documents with him, and never informed himself except through Kirchhofer concerning the risks. He made no personal application to the insurers. All that was done was done by the agent.

There was a dispute of fact, whether Reynolds made any specific payment of renewal premiums, and also whether he had notice of the cancellation. There was also a question concerning the date of any payment, if made.

Upon the trial, in order to show a recognition by the company of a policy as existing after the cancellation, Reynolds was allowed to introduce two lists of insurances in various companies certified to him by Kirchhofer, on the 29th of July, 1874. One of these was a list of risks taken by Kirchhofer, purporting to include the policy now in controversy, as dated April 2, 1874, for three thousand dollars, at a premium of one hundred and thirty-five dollars. This list made up twenty thousand dollars insurance. The other

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

list showed eight thousand dollars insurance in different companies, taken by another agent in Ypsilanti. There was also a receipt dated July 30, 1874, for nine hundred dollars, being the aggregate of all the premiums in Kirchhofer's list, including this policy. This included past payments and a note and the five per cent. commission.

These papers were inadmissible. They had nothing to do with any business pending between Reynolds and the company. If he had any rights they grew out of a previous insurance. Kirchhofer did not represent the company, so far as we can perceive, so as to estop them by such admissions, and they were not made in the course of his agency. The statements were his own statements as the agent of Reynolds, and for the information of Reynolds as his principal concerning his private agency business. It would be improper to treat such papers as equivalent to a policy of insurance, or as in any sense a communication from the insurance company. They were merely memoranda of the transactions which Kirchhofer had carried on for Reynolds, as the receipt was his personal voucher for money paid him to reimburse him for advances. If untrue, it was a fraud on Reynolds, for which no one but Kirchhofer could be held responsible.

It is no part of an insurance agent's duty to his company to look after the insurances of other persons, and all that he does in that way beyond what relates to insuring in his own company in the usual course of business, and for premiums paid, is outside of his official character. As an insurance broker he represents the insured, and not the insurer. And inasmuch as there was evidence in this case, which was open to the jury (even if seriously disputed, which in many things it was not), tending to show that Kirchhofer did not exact payments for premiums when due, but kept a private account with Reynolds, who only paid him when called upon,—the effect of this upon various questions in controversy is quite important.

If notice of cancellation was necessary, and if repayment

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

of premium was necessary to complete it, as is usually the case, it may be questionable how far such notice is required when the agent of the company is also the only agent or person with whom the company has acted on behalf of the insured. It is certainly not necessary to give notice to a principal who deals through a broker who is notified, or to repay money to any one but the broker who pays the premium. If the jury believed that the arrangements with Kirchhofer were such that he gave a personal credit to Reynolds, and advanced or arranged the premiums out of his own moneys or credits with the company, then the restoration to him was a sufficient repayment. And his subsequent collection from Reynolds of money on which there was no existing insurance, and without any agreement to apply it on future insurance, could not have the effect of reviving an insurance that the company had canceled. It might be a fraud against Reynolds, but it could not bind the company. To revive a canceled policy already rejected by the company, would require evidence of authority in the agent to rescind or recall the action of his principal, which could not be presumed, and would also require clear proof of an understanding that that specific act was intended to be done.

So far as we can determine from the record, there is an absence of proof of any such arrangement, as well as of any power to make it; and the charges resting on the saving effect of payments made before July 29th are erroneous, unless they can be sustained by confining them to payments made specifically on this policy in advance of, or in the absence of any legal cancellation, and in the absence of such refunding as was required.

We have already said, that if Kirchhofer was acting in the capacity of an insurance broker for Reynolds, and keeping an account with him generally, not receiving specific premiums as they were due to and reported to the company, his knowledge of cancellation and the return or credit to him by the company of the premium, would bind Reynolds.

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

As it was Kirchhofer's duty to notify persons insured, and to deal with them in cases of cancellation, the failure to do so was a breach of duty; but if he was himself the party to receive as well as to give notice, the company was exonerated when dealing with him as the agent of the insured, as it would have been in dealing with any other agent of that person. Reynolds, by employing him in this double and anomalous capacity, directly contributed to producing the complication. The whole arrangement whereby Kirchhofer procured the insurances by extra inducements to Reynolds in the way of sharing the commissions on premiums, had a tendency to lessen his vigilance in guarding the company's interests, and taking doubtful risks, and the credit arrangements were in the same direction. It is not presumable that either of these elements were within the scope of any authority granted by the company, and they indicate very clearly an agency from Reynolds.

A question arose concerning actual notice and acquiescence in the cancellation, which became very material in one view of the case. An agent named Chandler testified to a conversation which, if believed, showed this beyond dispute. Reynolds denied it. Kirchhofer's testimony corroborated Chandler's. The court, when requested, refused to charge, that if the renewal was canceled, and if a conversation was held in substance as testified to by Chandler, the plaintiff could not recover. No equivalent charge was made, and the assumption seems to have been, that without a return of the premium, neither notice of cancellation nor personal acquiescence in it without conditions would avail.

We can see no sufficient reason for this refusal. The question does not come within the mischief of the decisions which hold it objectionable to ask for an instruction putting the whole case on the credit given by a jury to a single witness. This conversation was a specific and vital fact in itself, and quite distinct from many things testified to by Chandler. It did not depend on his testimony alone, and was not so rested by the request to charge. It was a proper

HARTFORD FIRE INSURANCE CO. v. REYNOLDS.

request, unless incorrect in law. But the conversation, if accepted, showed that Reynolds did not pretend to have any rights under the renewal which had been cancelled, and made no claim that he paid any premium, and claimed no reimbursement. It was entirely inconsistent with any right or claim of right. It also tended to show a different renewal from that declared on.

We think, therefore, that the case was not presented to the jury as plaintiff in error had a right to have it laid before them.

The judgment must be reversed, with costs, and a new trial granted.

The other Justices concurred.

INDEX.

INDEX TO CASES REPORTED IN THIS VOLUME.

ABSENCE.

See EVIDENCE, 9, 10.

ABSENCE OF EVIDENCE.

See CHARGE TO THE JURY, 4-6.

ABUSE OF CONFIDENCE.

See ATTORNEYS, 1-7.

ABUSE OF LEGAL PROCESS.

See CONTRACTS, 8-16.

ACCEPTANCE.

Of delivery: See SALES, 2, 3.

Of new firm as debtor: See PARTNERSHIP, 3.

See CONTRACTS, 1, 2: INFANTS, 2: PROHIBITORY LIQUOR LAW,
2: WAIVER, 1, 2: WILLS, 5.

ACCESSORY.

See BANKS, 4.

ACCORD AND SATISFACTION.

See SETTLEMENT, 2.

ACCOUNTING.

See EQUITY JURISPRUDENCE, 3, 4.

ACCOUNT BETWEEN STATE AND COUNTY.

See MANDAMUS, 5: TAXATION, 5-9.

ACKNOWLEDGMENT.

See DEEDS, 1: FORECLOSURES, 27-29: PLATS, 1.

56 MICH.—65.

ACQUIESCENCE.

See **BANKS**, 3-5: **MANDAMUS**, 13: **PRACTICE IN SUPREME COURT**, 7: **RAPE**, 2-4.

ADDITIONAL COMPENSATION.

See **COUNTY CLERK**, 1-3.

ADDITIONAL NAME.

See **PROMISSORY NOTES**, 9.

ADDITIONAL PROOFS.

See **EQUITY PLEADING AND PRACTICE**, 2.

ADJOINING COUNTY.

See **DISSOLUTION OF ATTACHMENT**, 1-3.

ADJOINING PROPRIETORS.

See **LINE FENCES**, 1, 2.

ADMINISTRATION.

See **MANDAMUS**, 14.

ADMINISTRATOR.

See **EVIDENCE**, 13, 14.

ADMISSIONS.

See **AGENCY**, 3, 4: **CORPORATIONS**, 1, 2.

ADOPTION.

See **CONTRACTS**, 2.

ADULTERY.

See **CONTRACTS**, 8-16: **DIVORCE**, 1-3.

ADVANCES.

See **EVIDENCE**, 16.

ADVERSE CLAIMANTS.

See **FORECLOSURES**, 19, 20.

ADVERSE INTERESTS.

See **BANKS**, 1-5.

ADVERSE PARTY.

See **AMENDMENTS**, 1, 2.

AFFIDAVIT FOR CAPIAS.

An affidavit for *capias* should set forth in detail the facts and circumstances, and not mere conclusions upon information and belief, so that when presented to an officer to fix bail, he can exercise some judgment based upon the facts, and not the conclusions merely of the affiant.—*Hackett v. Judge of Wayne Circuit*, 334.

AFFIRMANCE.

See **INFANTS**, 1.

AFFIRMATIVE DEFENSE.

See **EQUITY PLEADING AND PRACTICE**, 6.

AFFIRMATIVE RELIEF.

See **EQUITY PLEADING AND PRACTICE**, 5.

AGENCY.

1. Upon the question whether a party had authority to do an act as agent of another, evidence of the fact that he assumed to do the act cannot be made use of as evidence that the power so assumed actually existed.—*Reynolds v. Continental Ins. Co.*, 131.
 2. Rulings excluding evidence offered to prove agency become immaterial where the agency is afterwards proved by the introduction of the written agreement of agency, which is not disputed.—*Ibid.*
 3. Admissions of an agent, made after the fact, and entirely unconnected with any act of agency, are not evidence of the fact.—*Bowen v. School District, etc.*, 149.
 4. Proof that a person is clerk for another does not establish his right to receive for his employer payment of demands not shown to have any connection with the business; and evidence simply that payment was made to such clerk of such demands, is not a sufficient showing of agency to receive the same, to authorize evidence of admissions by such clerk of the payment thereof to him.—*Ibid.*
- See **BANKS**, 2-5; **CONTRACTS**, 2; **CORPORATIONS**, 1, 2; **INSURANCE**, 1, 2, 8-12; **SALES**, 2; **STATUTE OF FRAUDS**, 2.

AGENT.

For collection: See PROMISSORY NOTES, 8.
See INFANTS, 1.

AGGRAVATION.

See DIVORCE, 1.

AGREEMENT.

To discharge a mortgage: See CONTRACTS, 19.
To receive pay in labor: See CONTRACTS, 17.
To release: See CONTRACTS, 20.
To sell: See LEASES, 6.
See ASSIGNMENT, 5: PAYMENT, 2: WAIVER, 1, 2.

AGRICULTURAL PURPOSES.

See LEASES, 4.

ALIMONY.

See CONTRACTS, 3.

ALLOWANCES.

See COUNTY CLERK, 3: DECLARATION, 1-5.

AMBIGUITY.

See FORECLOSURES, 29.

AMBIGUOUS HINTS.

See EVIDENCE, 8.

AMENDMENTS.

1. The power to amend is a highly valuable one, and ought not to be limited beyond what is necessary to keep it within safe bounds; and where the record itself furnishes the data for the required amendment, great liberality should be allowed; but where the amendment is to be made on an extrinsic showing, all practical precautions should be observed that no one be wronged by the action taken; and there ought always in such cases, where practicable, to be notice to the party adversely interested, and especially where the proceedings are ancient.—*Montgomery v. Merrill*, 97.
2. Where an amendment is sought to the proof of service of process, in order to make the record show jurisdiction of the defendant, so as to give validity and force to the judgment

rendered in the cause, for the purpose of making use of the same in another suit, to sustain rights claimed to have been derived under the judgment, the party adversely interested in such latter suit is entitled to notice.—*Ibid.*

3. In general such amendments are not suffered to affect rights which third parties may have acquired while the proceedings remained defective.—*Ibid.*
4. An application for leave to amend, which is not made until seventeen years after the defective proceedings were had, comes too late; and the fact that the defects were not discovered until after the lapse of a considerable portion of this delay, does not help the matter where there has been a further delay after such discovery of three years and more, which is only excused by a showing that the circuit judge had been of counsel in the case and was incompetent to hear an application. The utmost promptness is required when application is to be made to correct errors in the record.—*Ibid.*
5. The query is suggested, whether it is competent under any circumstances to amend a return on which jurisdiction over property depends, after the suit has been discontinued.—*Haynes v. Knowles*, 407.
6. A return cannot be amended in matters affecting the jurisdiction without notice to the parties to be affected by it.—*Ibid.*
7. An officer who is sued for misconduct in office cannot, pending the trial, manufacture evidence for himself by an *ex parte* amendment of his return covering the official action which is the basis of the suit against him.—*Ibid.*

See EJECTMENT, 1: EQUITY PLEADING AND PRACTICE, 2: FORECLOSURES, 2.

AMICABLE ARRANGEMENT.

See CONTRACTS, 20, 21.

AMOUNT.

See EQUITY JURISPRUDENCE, 6, 9: FORECLOSURES, 5, 6, 14, 15, 21: SALES, 1-3: TAXATION, 2, 4: VENDOR'S LIEN, 1.

ANNEXING COPY DEED.

See EQUITY PLEADING AND PRACTICE, 3.

ANNUAL SALARY.

See COUNTY CLERK, 3.

ANOTHER SUIT PENDING.

See EVIDENCE, 19: PLEA IN ABATEMENT, 3.

ANSWER.

See EQUITY PLEADING AND PRACTICE, 3, 6: MANDAMUS, 13:
SPECIFIC PERFORMANCE, 2.

ANTEDATED.

See FORECLOSURES, 28, 29.

APPEALS.

See ATTORNEYS, 4, 5: ESTATES OF DECEASED PERSONS, 1-4:
FORECLOSURES, 6, 10: JUSTICE'S COURTS, 2: MANDAMUS, 2:
TOWNSHIP DRAIN COMMISSIONER, 1-4.

APPEARANCE.

See FORECLOSURES, 13: PRACTICE IN CIRCUIT COURTS, 5.

APPENDAGES OF SCHOOL-HOUSE.

See SCHOOL DISTRICTS, 7.

APPLICATION.

For dissolution: See ATTACHMENT, 1, 2.

For mandamus: See MANDAMUS, 6-8.

Of payments: See FORECLOSURES, 20: MORTGAGES, 6.

Of verdict: See TRESPASS TO LANDS, 4.

To take further proofs: See EQUITY PLEADING AND PRACTICE, 2.

APPOINTMENT.

See GUARDIAN SALES, 6: MANDAMUS, 12, 13: SUPERINTEND-
ENTS OF THE POOR, 1-4.

APPORTIONMENT.

See REPRESENTATIVE DISTRICTS, 1, 2: TAXATION, 4.

APPROPRIATION.

Of corporate funds: See EQUITY JURISPRUDENCE, 2-6.

See STREET PAVING, 3, 5.

ARBITRATION.

See MUNICIPAL CORPORATIONS, 7.

ARGUMENTS TO THE JURY.

See PRACTICE IN CIRCUIT COURTS, 2.

ARREST FOR ADULTERY.

See CONTRACTS, 8-16.

ARTICLES OF ASSOCIATION.

See DECLARATION, 1.

ASSENT.

See CONTRACTS, 1: LAND CONTRACTS, 2: RAPE, 2-4.

ASSESSOR.

See SCHOOL DISTRICTS, 1-4.

ASSIGNEE.

See MORTGAGES, 10, 11, 13: PROMISSORY NOTES, 5.

ASSIGNMENT.

1. The right of action in tort for taking and converting personal property, or for injury to one's estate, and generally all such rights of action for tort as would survive to the personal representatives, may be assigned so as to pass an interest to the assignee which may be enforced in a court of law; but the right of action for a tort is not in general the subject of assignment.—*Finn v. Corbett*, 318.
2. And in an action upon a judgment in trespass by one who claims as assignee before judgment of the right of action, and of the judgment which might be recovered thereon, the record not showing the nature of the cause of action so assigned, it will not be assumed it was an assignable one, for the purpose of imputing error in the rulings and judgment of the trial court.—*Ibid.*
3. An assignee of a judgment takes subject to any matters of set-off existing in favor of the judgment debtor against the assignor, up to such time as such debtor has notice of the assignment.—*Ibid.*
4. A mere possibility is not the subject of assignment; but the assignment of wages to be earned in the future under an existing employment is valid, the possibility of future earnings in such case being coupled with an interest.—*Kane v. Clough*, 436.
5. An assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment when the demands intended are subsequently brought into existence; and the assignee of future wages would have a right in equity, when the wages were earned, to protect his interest to the extent to which they were earned.—*Ibid.*

6. The fact that the employment the future wages of which were assigned was piece work, it being at the time the expectation of all parties concerned that the employment would be continuous, would not detract from the validity of the assignment, at least so far as concerns wages afterwards actually earned by the continuation of such employment.—*Ibid*. See FRAUD, 6: LEASES, 7: MORTGAGES, 10, 11, 13.

ASSUMING DEBTS.

See PARTNERSHIP, 1, 3.

ASSUMPSIT.

See DECLARATION, 2, 6, 7: IMPLIED PROMISE, 1: MANDAMUS, 1: STREET PAVING, 5.

ASSUMPTION OF AUTHORITY.

See AGENCY, 1.

ATTACHMENT.

1. An application for the dissolution of an attachment should allege a right in the applicant to the possession of the property attached.—*Johnson v. De Witt*, 95.
2. Where on the hearing upon an application to dissolve an attachment it appears that the applicants are not entitled to the possession of the goods attached, and that the same were held by officers of the law by virtue of executions against them, the application should be denied; the officers could not be deprived of their possession in this collateral way.—*Ibid*.
3. There is no room for a presumption that a levy of an attachment running against the goods and chattels of one member of a firm, upon specific partnership property, item by item, the appraisal being made in like manner, is a levy upon the partnership interest only of the defendant in the writ.—*Haynes v. Knowles*, 407.
4. A levy on the interest of a partner, if it can be made at all under an attachment, cannot be made on specific chattels. Such a levy is a trespass.—*Ibid*.
5. The unlawful levy of an attachment against one member of a firm on specific chattels of the firm is injurious to both partners, and may therefore be the subject of a joint action, and give rise to a joint judgment, where the injury is tangible and the property disturbed or destroyed.—*Ibid*.
6. And damages in such case for the destruction of the business are allowable.—*Ibid*.
7. The right to the possession of the farm for the five years under the contract in question was a chattel interest, and if

- subject to seizure on attachment, it was as a chattel interest, and not as real estate; and a levy upon the farm as real estate, making no reference to the mere possessory right, would not reach that interest.—*Grover v. Fox*, 453.
8. The contingent right to a conveyance under the contract was not a legal interest, but a mere equity, and incapable of being held by levy at common law.—*Ibid.*
 9. If such contingent right was liable to be subjected upon attachment and execution, it could only be done through compliance with the statute (*Comp. L. 1871, § 4628*) providing for supplementing levies by proceedings to ascertain and determine the interest seized; and assuming the levies were properly shaped to subject such right, it would be indispensable to their continuance in force that proceedings be taken, either before sale or within a year thereafter, to ascertain and determine the interest.—*Ibid.*
 10. The condition on which the right to reconveyance hinged never having been performed, and the time for its performance having expired before the sales on the executions, the equity of the debtor in the lands was extinguished and no interest or right remained to support the proceedings.—*Ibid.*
 11. The attachment creditors having purchased in the mortgage, their offer to surrender it to the mortgagor's wife, on condition that she would convey the farm as provided in the agreement she had given her husband, could have no force, as they then had no title to such agreement for conveyance, and had no right to call upon her for performance of its covenants.—*Ibid.*

See DISSOLUTION OF ATTACHMENT, 1-3: EQUITY JURISPRUDENCE, 8: ESTATES OF DECEASED PERSONS, 1.

ATTORNEYS.

1. Where a suit in equity against an attorney and solicitor charging him with fraud under circumstances implicating him in a gross abuse of confidence, has been before the court on the facts and the court has decreed against him, an order to show cause why he should not be struck from the rolls may properly be based on the decree, or be incorporated in the decree itself.—*Matter of George W. Wool*, 299.
2. Upon an order to show cause based upon such a decree, which has been rendered after a full hearing upon the very facts involved, there is no reason why any reference to take further evidence on the main facts should be allowed, unless on a showing which would justify a rehearing.—*Ibid.*
3. In the present case, however, the respondent was permitted to make such showing as he deemed proper, which he did by affidavits.—*Ibid.*

4. The decision of the circuit judge on the facts in a chancery cause is entitled to great weight with the appellate court, he being supposed to have some better personal knowledge of the witnesses than is to be presumed in the appellate court; but the latter court has no right, if plainly convinced, to abdicate its own duty of determining every case upon its own view of the facts.—*Ibid.*
5. It is one of the difficulties attending all tribunals passing upon facts, that the reasons for believing particular witnesses, or particular testimony, in preference to others, cannot be defined; but they must nevertheless act on the belief which the testimony creates; and that belief does not usually involve the rejection or acceptance of all that is said by any particular witness.—*Ibid.*
6. A showing that relates only to the good character of one who testified as a witness on respondent's behalf in the equity suit, where his testimony tended only to contradict that of complainant as to the manner in which the latter claimed the fraud had been brought about, and was not conclusive on the main fact, is not a very pertinent answer to an order to show cause why respondent should not be disbarred for the fraud and abuse of confidence of which he had been decreed guilty in the equity suit.—*Ibid.*
7. Nor is a showing of bad character of the complainant in the equity suit very material to the issue on such order. The law does not deny its protection against frauds to all but the virtuous, though it may require strong proof that they have been defrauded.—*Ibid.*

See DISSOLUTION OF ATTACHMENT, 1: INFANTS, 1: PRACTICE IN CIRCUIT COURTS, 2: WITNESSES, 2.

AUDITOR GENERAL.

See MANDAMUS, 4, 5: TAXATION, 9.

AUTHORITY.

See AGENCY, 1-4: CONTRACTS, 2: CORPORATIONS, 1, 2: INFANTS, 1: INSURANCE, 1, 2, 11: MUNICIPAL CORPORATIONS, 1-8: RECEIPTORS, 3.

AVERMENT OF LIABILITY.

See DECLARATION, 5.

BAD CHARACTER OF PERSON DEFRAUDED.

See ATTORNEYS, 7.

BAD FAITH.

See FORECLOSURES, 22: PROMISSORY NOTES, 7, 8.

BAGGAGE.

See FRAUDULENT CONVERSION, 1-3.

BAILEE.

See FRAUDULENT CONVERSION, 2, 3.

BAILMENTS.

See SALES, 3.

BANK BILLS.

See CERTIFICATES OF DEPOSIT, 3: STATUTE OF LIMITATIONS, 4.

BANKING.

See CERTIFICATES OF DEPOSIT, 1-4.

BANKRUPTCY.

See EQUITY JURISPRUDENCE, 8.

BANKS.

1. Where it is sought to hold one who while president of a bank had loaned moneys of the bank to an irresponsible person, liable for the same on the basis of his representations to the cashier at the time of the loans that he was interested with the borrower and would see the amounts repaid, it is error to permit the party to testify whether he ever regarded himself as liable; his opinion respecting his legal liability had no bearing on the case.—*First National Bank of Sturges v. Reed*, 263.
2. A bank president who, while in general charge of the business with the cashier under his authority, has permitted and directed the drawing of moneys from the bank without security by one known or supposed to be irresponsible, and with whom he was interested in the business for which the money was obtained, and has requested the cashier not to say any thing to the directors about it, is held personally liable to the bank for the moneys thus paid out by him in violation of his trust.—*Ibid*.
3. The fact that the moneys thus drawn out were by the cashier, by direction and on the authority of the president, charged on the books of the bank to the irresponsible bor-

rower, would not necessarily determine the transaction as a loan to him by the bank; but the bank, in the absence of any act of ratification or acquiescence on its part, would have a right, under the circumstances, to repudiate it as a transaction with the nominal borrower, and to insist on repayment by its president.—*Ibid.*

4. And such president, if he persuaded the cashier not to make known the facts to the directors, could claim nothing because of the cashier's knowledge; that officer's silence might, under such circumstances, make him accessory to the fraud, but could not tend to excuse the principal.—*Ibid.*
 5. The question of the effect to be given to the long silence of the bank directors after the charge to the nominal borrower was entered upon the bank books, is one of ratification, and should be submitted to the jury as such.—*Ibid.*
- See CERTIFICATES OF DEPOSIT, 1-4: STATUTE OF LIMITATIONS, 4.

BAR.

See PLEA IN ABATEMENT, 3.

BARN.

See CURTILAGE, 1.

BASIS OF ESTIMATE.

See TAXATION, 4.

BAY CITY.

See FINES, 1-4.

BELIEF.

See ATTORNEYS, 5.

BENEFICIARIES.

See EQUITY JURISPRUDENCE, 1: MORTGAGES, 10: WILLS, 2, 4.

BENEVOLENT SOCIETIES.

See DECLARATION, 1-5.

BEQUESTS.

See WILLS, 1-5.

BILL OF COMPLAINT.

See DIVORCE, 1: FORECLOSURES, 1, 2, 7.

To quiet title: See EQUITY JURISPRUDENCE, 8.

To redeem: See EQUITY JURISPRUDENCE, 9: GROWING CROPS, 3.

BILL OF EXCEPTIONS.

See **CHARGE TO THE JURY, 5: PRACTICE IN SUPREME COURT, 5.**

BLIND REMARKS.

See **EVIDENCE, 8.**

BLOCKS.

See **EVIDENCE, 6.**

BOARD OF SUPERVISORS.

See **COUNTY CLERK, 1: TAXATION, 10.**

BONA FIDE PURCHASERS.

Purchasers of land the record title of which is free from any indication of a valid outstanding claim in any one, who hold a good legal title, combined with the full equities of *bona fide* purchasers without notice, cannot be disturbed in their rights without superior equities, and there are no equities superior to those of such purchasers.—*Loomis v. Brush, 40.*

See **PROMISSORY NOTES, 1-3, 5-8: STATUTE OF LIMITATIONS, 4: WAIVER, 2.**

BONDS.

For injunction: See **GROWING CROPS, 3.**

See **GUARDIAN SALES, 5: SURETIES, 1.**

BOOKS.

Of account: See **BANKS, 3-5.**

See **PRACTICE IN CIRCUIT COURTS, 4.**

BOOM COMPANIES.

See **WAIVER, 1, 2.**

BOUNDARIES.

See **EVIDENCE, 15: REPRESENTATIVE DISTRICTS, 1-3.**

BREACH.

Of trust: See **BANKS, 2-4; EQUITY JURISPRUDENCE, 3.**

See **CONTRACTS, 4-6: EVIDENCE, 19.**

BROKEN CONTRACT.

See **STREET PAVING, 2.**

BROKERAGE.See **INSURANCE**, 10.**BUILDING COMMITTEE.**See **COUNTY CLERK**, 2.**BUILDING PURPOSES.**See **MANDAMUS**, 10.**BUILDINGS.**See **INSURANCE**, 5-9.**BURDEN OF PROOF.**See **PROMISSORY NOTES**, 2.**BUSINESS OF PAYEE.**See **PROMISSORY NOTES**, 1-3.**BY-LAWS.**See **DECLARATION**, 1-5: **FINES**, 1-4.**CANCELLED POLICY.**See **INSURANCE**, 11.**CAPIAS.**See **AFFIDAVIT FOR CAPIAS**.**CASE MADE BY THE BILL.**See **EQUITY PLEADING AND PRACTICE**, 4.**CASES IN MICHIGAN REPORTS CITED AND COMMENTED
UPON.**

	PAGE.
Adams Mining Company v. Senter, 26 Mich., 73.	53
Albright v. Cobb, 30 Mich., 355.	146
Allen v. McKibbin, 5 Mich., 449.	344
Allison v. Chandler, 11 Mich., 542.	410
American Ins. Co. v. Woodruff, 34 Mich., 6.	262
Anderson v. Baughman, 7 Mich., 69.	81
Attorney General v. Holihan, 29 Mich., 116.	448-9
Attorney General v. Oakland County Bank, Walk. Ch., 90. 250, 403	
Ballou v. Hill, 25 Mich., 205.	225
Beardslee v. Horton, 3 Mich., 560.	21

	PAGE.
Beecher v. Baldy, 7 Mich., 488.	401
Belden v. Laing, 8 Mich., 500.	159
Bellair v. Wool, 35 Mich., 440.	300
Berry v. Innes, 35 Mich., 189.	232
Blackwood v. Brown, 32 Mich., 107.	376
Blackwood v. Brown, 34 Mich., 4.	21
Bresler v. Pendell, 12 Mich., 224.	62
Brewer v. Palmer, 13 Mich., 104.	422
Briggs v. Withey, 24 Mich., 136.	358
Brown v. Hazen, 11 Mich., 219.	326
Brown v. Thompson, 29 Mich., 74.	298
Buckley v. Saxe, 10 Mich., 328.	156
Buhl v. Kenyon, 11 Mich., 249.	459
Burk v. Webb, 32 Mich., 182.	225, 443
Butterfield v. Beardsley, 28 Mich., 412.	95
Campau v. Shaw, 15 Mich., 226.	357
Campbell v. White, 22 Mich., 185.	238
Caruthers v. Humphrey, 12 Mich., 270.	366
Case v. Dean, 16 Mich., 12.	223
Cate v. Patterson, 25 Mich., 191.	497
Catlin v. Birchard, 13 Mich., 110.	21
Chaffee v. Granger, 6 Mich., 51.	9
Chandler v. Allison, 10 Mich., 460.	410
Chandler v. Nash, 5 Mich., 409.	260
Conn. Mut. Life Ins. Co. v. State Treasurer, 31 Mich., 17.	453
Cooper v. Bigly, 13 Mich., 463.	93
Corkins v. Collins, 16 Mich., 480.	62
Clark v. Hall, 19 Mich., 356.	76
Clay F. & M. Ins. Co. v. Huron Salt, etc., Co., 31 Mich., 346.	144
Crapo v. Seybold, 35 Mich., 189.	445
Crawford v. Tuller, 35 Mich., 57.	282
Dayton v. Rounds, 27 Mich., 82.	343
De Armand v. Phillips, Walk. Ch., 186.	213, 357
Delevan v. Bates, 1 Mich., 97.	250
Denison v. Smith, 33 Mich., 155.	102
Det. & Mil. R. R. Co. v. Van Steinburg, 17 Mich., 99.	209
Dodge v. Brewer, 31 Mich., 227.	466
Doyle v. Howard, 16 Mich., 261.	466
Dunton v. Brown, 31 Mich., 182.	130
Dutton v. Ives, 5 Mich., 515.	373
East Saginaw Water Comrs. v. Com. Council, 33 Mich., 164.	273
Emery v. Whitwell, 6 Mich., 474.	102
Engle v. Shurts, 1 Mich., 150.	155
English v. Carney, 25 Mich., 178.	172
Evans v. People, 12 Mich., 27.	209
Farwell v. Fox, 18 Mich., 166.	203
Final v. Backus, 18 Mich., 231.	319

	PAGE.
Fosdick v. Van Husan, 21 Mich., 567.	472
Fowler v. Hoffman, 31 Mich., 215.	29
Fox v. Shipman, 19 Mich., 218.	196
Fractional School District v. Mallary, 23 Mich., 111.	196
Frankenberg v. National Bank, 33 Mich., 46.	29
Gamber v. Holben, 5 Mich., 331.	212
Galloway v. Burr, 32 Mich., 332.	356
Gardner v. Gorham, 1 Doug., 507.	363
Gibbs v. Blanchard, 15 Mich., 292.	62, 326
Gibson v. Hibbard, 13 Mich., 215.	156
Gilbert v. Kennedy, 22 Mich., 117.	146
Goodenow v. Curtis, 18 Mich., 298.	81
Goodrich v. Detroit, 12 Mich., 279.	9, 343
Gorham v. Arnold, 22 Mich., 247.	459
Grover v. Fox, 36 Mich., 453.	462
Hall v. Kellogg, 16 Mich., 135.	223
Halsted v. Francis, 31 Mich., 113.	49
Harbaugh v. Cicott, 33 Mich., 241.	29
Hatheway v. Sackett, 32 Mich., 97.	426
Hibernia Ins. Co. v. O'Connor, 29 Mich., 241.	298
Hogsett v. Ellis, 17 Mich., 368.	366
Hotchin v. Secor, 8 Mich., 494.	363
Hunt v. Thorn, 2 Mich., 213.	403
Ingalls v. Eaton, 25 Mich., 32.	250
Ives v. Kimball, 1 Mich., 313.	81
John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich., 41.	184-5
Joslin v. Millspaugh, 27 Mich., 517.	286
Josselyn v. McAllister, 25 Mich., 45.	335
Kimball v. Kimball, 16 Mich., 211.	403
Kinnie v. Owen, 1 Mich., 249.	250
Kling v. Fries, 33 Mich., 275.	154
Kornemann v. Monaghan, 24 Mich., 36.	144
Lacey v. Davis, 4 Mich., 140.	223
Ladue v. Detroit & Mil. R. R. Co., 13 Mich., 380.	366
Lee v. Mason, 10 Mich., 403.	466, 465
Lovell v. Willard, 28 Mich., 346.	443
Lynch v. People, 16 Mich., 472.	250
Mabley v. Judge of Superior Court, 32 Mich., 190.	15
Macumber v. Beam, 22 Mich., 396.	97
Marathon v. Oregon, 8 Mich., 373.	343
Matter of Stephenson, 32 Mich., 60.	335
Mattison v. Marks, 31 Mich., 421.	373
McCormick v. Bay City, 23 Mich., 457.	198
McCurdy v. Clark, 27 Mich., 445.	172
McPharlin v. Mahoney, 30 Mich., 100.	197
Melster v. People, 31 Mich., 99.	144
Merrill v. Montgomery, 25 Mich., 73.	101

	PAGE.
Miller v. Finley, 26 Mich., 249.	444
Mixer v. Supervisors of Manistee County, 26 Mich., 422.	191
Montgomery v. Merrill, 18 Mich., 338.	101
Montgomery v. Merrill, 36 Mich., 97.	409
Moore v. Foote, 34 Mich., 443.	50
Moore v. Mandlebaum, 8 Mich., 433.	21
Moote v. Scriven, 33 Mich., 500.	66-7
Morrissey v. People, 11 Mich., 327.	209
Myers v. Carr, 12 Mich., 63.	250
Norris v. Showerman, 2 Doug., 16.	398
Norris v. Showerman, Walk. Ch., 206.	398
Osborne v. Robbins, 10 Mich., 278.	97
Paddack v. Pardee, 1 Mich., 421.	398
Paton v. Coit, 5 Mich., 505.	28
Peltier v. Peltier, Har. Ch., 19.	315
People v. Auditors of Wayne County, 13 Mich., 233.	333
People v. Common Council of Detroit, 34 Mich., 201.	343
People v. Controller of Detroit, 18 Mich., 445.	191
People v. Judges etc., 1 Doug., 319.	273
People v. Judge of Wayne Circuit, 19 Mich., 296.	273
People v. Taylor, 2 Mich., 250.	310
Perrott v. Shearer, 17 Mich., 54.	376
Peterson v. Manistee, 36 Mich., 8.	343
Pipp v. Reynolds, 20 Mich., 88.	49
Price v. Reed, 20 Mich., 72.	97
Ransom v. Ransom, 30 Mich., 328.	47
Rawson v. Finlay, 27 Mich., 268.	250
Robbins v. Barron, 33 Mich., 124.	220
Roberts v. Miles, 12 Mich., 297.	403
Russell v. Sweezey, 22 Mich., 235.	81
Sandford v. Flint, 24 Mich., 26.	466
School District v. Snell, 24 Mich., 350.	407
Schwartz v. Wendell, Wal. Ch., 267.	403
Second National Bank of Lansing v. Lansing, 25 Mich., 207.	9
Security Ins. Co. v. Fay, 22 Mich., 467.	144
Seiber v. Price, 26 Mich., 518.	356
Sirrine v. Briggs, 31 Mich., 443.	209, 410
Smith v. Auditor General, 20 Mich., 308.	76
Snyder v. Willey, 33 Mich., 483.	353
Spencer v. Towles, 18 Mich., 9.	21
Stevens v. Osman, 1 Mich., 92.	203
Stockwell v. Town Board of White Lake, 22 Mich., 341.	197
Stone v. Covell, 20 Mich., 359.	209
Stuart v. School District, 30 Mich., 69.	426
Taylor v. Tripp, 15 Mich., 518.	15
Taymouth v. Koehler 35 Mich., 22.	407
Thayer v. Sherlock, 4 Mich., 173.	251

	PAGE.
Thayer v. Swift, Walk. Ch., 384.	90
Thorne v. Hilliker, 12 Mich., 215.	94
Tillman v. Shackleton, 15 Mich., 457.	238
Todd v. Davis, 32 Mich., 160.	443
Tripp v. Hasceig, 20 Mich., 254.	179
Turner v. McCarty, 22 Mich., 265.	49
Twiss v. George, 33 Mich., 253.	403
Udell v. Kahn, 31 Mich., 195.	466
Van Dyke v. Davis, 2 Mich., 144.	403
Van Husan v. Kanouse, 13 Mich., 303.	366
Wales v. Jones, 1 Mich., 254.	159
Wayne County v. City of Detroit, 17 Mich., 390.	191
West v. Laraway, 28 Mich., 465.	238
Whiting v. Hill, 23 Mich., 399.	213
Willey v. Snyder, 34 Mich., 60.	203
Wright v. DeGroff, 14 Mich., 164.	145-6
Wright v. Wilson, 17 Mich., 192.	403
Youell v. Allen, 18 Mich., 107.	398

CASHIER.

See BANKS, 1-5.

CAUSE OF ACTION.

See ASSIGNMENT, 1-3: DECLARATION, 2: SETTLEMENT, 1, 2:
STATUTE OF LIMITATIONS, 2, 3.

CERTAINTY.

See PLEA IN ABATEMENT, 2.

CERTIFICATE.

Of acknowledgment: See FORECLOSURES, 27, 29.

See CERTIFIED COPY, 1, 2: CORPORATIONS, 2: DEEDS, 1:
PLATS, 1: SPECIFIC PERFORMANCE, 1: TAXATION, 1, 10.

CERTIFICATES OF DEPOSIT.

1. A certificate of deposit, payable on the return thereof properly endorsed, is in legal effect a promissory note, payable on demand; and the principles applicable to such notes should be applied to these certificates.—*Tripp v. Curtentius*, 494.
2. The argument that a certificate of deposit and a certified check are in legal sense the same thing, are governed by the same rules, and that no mere lapse of time will render such check or certificate past due or dishonored, is held not well founded.—*Ibid.*

3. Certificates of deposit are not intended for long circulation, or for more than a temporary convenience, and to hold that any ostensibly demand paper could be circulated or used as bank bills, would be contrary to the general policy of our banking laws.—*Ibid.*
4. These certificates being in legal effect promissory notes payable on demand, to refuse to apply the principles governing such notes, either because of the peculiar form of the instrument, or because issued by a firm engaged in the business of banking, would be to create a distinction unsound in principle and not warranted by any reason or necessity.—*Ibid.*
See STATUTE OF LIMITATIONS, 4.

CERTIFIED CHECKS.

See CERTIFICATES OF DEPOSIT, 2.

CERTIFIED COPY.

1. A certificate of the township clerk, attached to a copy of a chattel mortgage, that it is a true and compared copy of the original on file in his office, and of the whole of such original, is sufficient to entitle the copy so certified to be received in evidence.—*Bills v. Keesler*, 69.
2. The form of certificate indicated by the statute (*Comp. L. 1871, § 5931*), viz., that the copy certified is a true transcript compared by the officer with the original in his office, is not designed to be an exact and exclusive form which shall preclude all others; but a certificate which complies in substance with what is here required is sufficient; and another statute (*Comp. L. 1871, § 4711*) provides for the certification of copies of chattel mortgages, etc., filed with township and city clerks, and a certificate which complies with this statute is sufficient.—*Ibid.*

CERTIORARI.

See MANDAMUS, 2: TOWNSHIP DRAIN COMMISSIONER, 2, 4.

CHANCERY SALES.

See GROWING CROPS, 1-3.

CHANGING BOUNDARIES.

See REPRESENTATIVE DISTRICTS, 1-3.

CHARGE TO THE JURY.

1. Where the guardian has testified that she did not execute the guardian's deed in question, and also that she did not

- sign the petition for her appointment as guardian, it is competent for the court, in submitting to the jury the question of the genuineness of the deed, to instruct them to take into consideration the fact that she likewise denied her petition, which she was shown by the records to have signed.—*Lynch v. Kirby*, 238.
2. A party is entitled to a charge applicable to the theory of the case for which he contends and which his evidence tends to support.—*Comstock v. Norton*, 277.
 3. Instructions to the jury which submit to their consideration an hypothesis different from that maintained by either side and which is not supported by the evidence, are misleading and erroneous.—*Ibid.*
 4. Where it is a material question whether a party had notice of a certain fact, it is not proper, where there is a contest upon the facts, for the court to charge that there was no evidence tending to show such notice, except in a case free from doubt. Ordinarily not only the weight but the tendency of the evidence, when once introduced, becomes a question for the jury, who are to examine it and give it such effect in the light of all the facts as they think it fairly entitled to.—*Hayes v. Homer*, 374.
 5. Where the bill of exceptions does not purport to give all the evidence in the case, although it states that the substance of the entire testimony on the part of the plaintiff is given, it would hardly be safe to hold there was no evidence tending to show a particular fact and on that basis to overturn the ruling of the trial court refusing to so charge.—*Ibid.*
 6. There being evidence of a witness fairly tending to show that he notified the party of the fact, of which it is claimed there was no evidence of notice, it will not be held the court erred in refusing to charge there was no evidence of such notice, notwithstanding the cross-examination of the witness who testified to it may have shaken his testimony; the proper effect to be given to his entire testimony as a whole was for the jury, and not for the court, to determine.—*Ibid.*
 7. Where the jury's attention is strictly confined to questions depending wholly on the facts alleged in a particular count of the declaration, the error of refusing to charge that there can be no recovery except under that count, is cured.—*Hartfort Fire Ins. Co. v. Reynolds*, 502.
 8. A witness having testified to a conversation with plaintiff, wherein the latter made statements inconsistent with the rights he set up in his suit, and which, if true, precluded his recovery on his own theory, and this testimony being corroborated by other evidence, the refusal to charge, as requested, that if such a conversation as testified to was held, the plain-

tiff could not recover, is held error, in the absence of any equivalent charge.—*Ibid.*

See FRAUDULENT CONVERSION, 3: PRACTICE IN SUPREME COURT, 4: RAPE, 3, 4: RECEIPTS, 4: REQUESTS TO CHARGE, 1-4: SETTLEMENT, 2.

CHARITABLE SOCIETIES.

See DECLARATION, 1-5.

CHARITIES.

See WILLS, 3.

CHARTER OF DETROIT.

See STREET PAVING, 1-6.

CHARTS.

See SCHOOL DISTRICTS, 7-9.

CHATTEL INTEREST.

See ATTACHMENT, 7.

CHATTEL MORTGAGES.

1. A chattel mortgage of a stock of goods made August 31, 1875, which covered expressly not only all goods then in store, but all other goods to be thereafter put there, and which was not filed till November 4, 1875, is held valid as between the parties to bind goods purchased by the mortgagor and added to the stock in the store on October 4, 1875.—*American Cigar Co. v. Foster*, 368.
 2. The mortgage being valid as between the parties to bind the future additions to the stock, is equally valid as against a subsequent purchaser in good faith of the goods who had actual knowledge of the mortgage; such a purchaser stands on no better footing than his vendor.—*Ibid.*
- See CERTIFIED COPY, 1, 2: FORECLOSURES, 8, 9: REPLEVIN, 1-3.

CHECKS.

See FRAUDULENT CONVERSION, 1-3.

CIRCUIT COURT COMMISSIONERS.

See DISSOLUTION OF ATTACHMENT, 1-3.

CIRCUIT JUDGE.

See ATTORNEYS, 4: DISSOLUTION OF ATTACHMENT, 2: MANDAMUS, 6-8.

CIRCUMSTANTIAL EVIDENCE.

See DIVORCE, 2: EVIDENCE, 9, 10.

CITIES.

See MANDAMUS, 1: MUNICIPAL CORPORATIONS, 1-8: REPRESENTATIVE DISTRICTS, 1-3: STREET PAVING, 1-6.

CITY BY-LAWS.

See FINES, 1-4.

CITY COURTS.

See SUPERIOR COURT OF GRAND RAPIDS, 3, 4.

CITY ORDERS.

See MANDAMUS, 1.

CLERK.

See AGENCY, 4.

CLERK'S CERTIFICATE.

See DEEDS, 1.

CLOUDS UPON TITLE.

See EQUITY JURISPRUDENCE, 8.

COLLATERAL.

See MORTGAGES, 10, 11, 13.

COLLATERAL ATTACK.

See FORECLOSURES, 8: REPLEVIN, 1.

COLLATERAL PROMISE.

See STATUTE OF FRAUDS, 1-6.

COLLECTION OF TAXES.

See TAXATION, 7.

COLLECTOR.

See TAXATION, 12.

COLLUSION.

See BANKS, 1-5: FRAUD, 6.

COMMENTS ON EVIDENCE.

See CHARGE TO THE JURY, 1.

COMMISSIONER OF ADJOINING COUNTY.

See DISSOLUTION OF ATTACHMENT, 1-3.

COMMISSIONERS ON CLAIMS.

See ESTATES OF DECEASED PERSONS, 1-4.

COMMON COUNCIL.

See STREET PAVING, 1-6.

COMMON COUNTS.

See DECLARATION, 6, 7.

COMPENSATION.

See COUNTY CLERK, 1-3.

COMPETENCY.

See WITNESSES, 1.

COMPLAINTS OF PROSECUTRIX.

See RAPE, 1.

COMPOUNDING FELONIES.

See CONTRACTS, 8-16.

COMPROMISE.

See FRAUD, 2.

COMPUTATION.

See FORECLOSURES, 14.

COMPUTING INTEREST.

See EQUITY JURISPRUDENCE, 9.

CONCLUSIONS.

Of fact: See FINDING OF FACTS, 3-5: PRACTICE IN SUPREME COURT, 9, 10.

Of law: See AFFIDAVIT FOR CAPIAS: FINDING OF FACTS, 1-3: PRACTICE IN SUPREME COURT, 9.

CONDEMNING LANDS FOR RAILROAD.

See EMINENT DOMAIN, 1.

CONDITION PRECEDENT.

See CONTRACTS, 3: DECLARATION, 3: LINE FENCES, 1.

CONDITIONS.

See ATTACHMENT, 10: GUARANTY, 1, 2.

CONFIRMATION.

See CONTRACTS, 9.

CONFLICTING CLAIMS.

See FRAUD, 2.

CONFLICT OF EVIDENCE.

See LAND CONTRACTS, 2.

CONJECTURE.

See FINDING OF FACTS, 7: TAXATION, 3.

CONSENT.

Of ward: See GUARDIAN SALES, 6.

See LAND CONTRACTS, 2: RAPE, 2-4.

CONSIDERATION.

Paid: See INFANTS, 3: LAND CONTRACTS, 1, 2.

See CONTRACTS, 7-16: PROHIBITORY LIQUOR LAW, 1-3: PROMISSORY NOTES, 1-4: SET-OFF: STATUTE OF FRAUDS, 4-6.

CONSPIRACY.

See EVIDENCE, 7, 8.

CONSTABLES.

See RECEIPTS, 2.

CONSTITUTIONAL LAW.

See FINES, 2: LEGISLATIVE AUTHORITY, 1, 2: REPRESENTATIVE DISTRICTS, 1-3: SUPERIOR COURT OF GRAND RAPIDS, 2-4: TAXATION, 7.

CONSTITUTION CONSTRUED.

	PAGE.
Art. IV., § 4: Representative districts.	448
Art. VI., § 1: Judicial power; municipal courts.	333
Art. VI., § 26: Security from search and seizure.	335
Art. XIII., § 12: Fines; penal laws; school libraries.	188
Art. XVI., § 2: Homestead exemption.	400

CONSTRUCTION.

See CONTRACTS, 3, 17-21: FINDING OF FACTS, 2: GUARANTY, 1, 2: HOMESTEAD, 1: INSURANCE, 4-7: LEASES, 2-7: MORTGAGES, 4-9: MUNICIPAL CORPORATIONS, 6, 7: PRACTICE IN SUPREME COURT, 5-7: STATUTE OF LIMITATIONS, 3: TAXATION, 7, 13-15.

CONSTRUCTIVE NOTICE.

See BONA FIDE PURCHASER: FORECLOSURES, 8, 9: HUSBAND AND WIFE, 4: REPLEVIN, 1.

CONSULTING DIRECTOR.

See CORPORATIONS, 2.

CONTENTS OF LETTERS.

See EVIDENCE, 2.

CONTIGUOUS PARCELS.

See FORECLOSURES, 24.

CONTINGENT CLAIMS.

See ESTATES OF DECEASED PERSONS, 1-4.

CONTINGENT RIGHT TO CONVEYANCE.

See ATTACHMENT, 8-11.

CONTINUOUS EMPLOYMENT.

See ASSIGNMENT, 6.

CONTINUOUS SERVICE.

See STATUTE OF LIMITATIONS, 1.

CONTRACTORS.

See STATUTE OF FRAUDS, 3.

38-MICH.-68.

CONTRACTS.

1. A contract made by a father in his infant son's name, and without the knowledge of the son, is of no binding force upon the son until he has in some way assented to it, and does not, therefore, of itself confer upon him any rights.—*Armitage v. Widoe*, 124.
2. The real force and effect of the son making his own by adoption the contract thus made in his name by his father, is to retrospectively make the father his agent, or to give the father authority retrospectively, by claiming as his own that which without authority at the time was made in his name.—*Ibid.*
3. Sureties on a *ne exeat* bond in a divorce suit having, after decree granting alimony and continuing the *ne exeat* in force, and after their principal had committed a breach of the bond and suit had been brought on the same, entered into a contract with the complainant in the divorce suit, whereby they undertook, in case they should obtain leave to and should surrender their principal in their discharge as sureties, and should thereupon be discharged, and further, in case such principal should not perform such decree and should be committed for contempt or for want of bail, in consideration that the suit on the bond should be discontinued, and which it was declared should be done on such surrender, to pay all the costs and fees of the jailer for the custody and keeping of said principal, and in case the principal should not eventually, and before being discharged, pay or perform the decree in the divorce suit, or satisfactorily secure the same, then to pay said complainant the amount for which they were sureties in the bond, it was held that the obtainment of the discharge of the sureties from liability on the bond, and the capture and surrender of their principal, and the discontinuance of the suit on the bond, and the enforcement of the decree against said principal if practicable, were conditions precedent to any liability on the part of said sureties to pay said complainant any thing upon said contract; and that a finding of facts which negatives performance of these several conditions precedent, is conclusive against any right of action in favor of said complainant on said contract.—*Cadwell v. Randall*, 251.
4. The suing out and service of an injunction is held to be a breach of a contract to allow the plaintiff to make use of a patented improvement.—*Sullings v. Goodyear Dental Vulcanite Co.*, 313.
5. Though one who is served with an injunction and is not served with subpoena may doubtless have the injunction set

aside for irregularity, and might possibly under some circumstances be justified in disregarding it altogether, yet where one having a contract permitting him to use a patented improvement is served with injunction at the suit of his grantor he has a right to treat it as a public and formal declaration on the part of such grantor not to abide by his contract, and is under no obligation, when the necessary steps are not taken to bring him before the equity court in the injunction suit, to present himself there to get rid of the writ of injunction.—*Ibid.*

6. It does not lie with the party who has caused an injunction to issue in violation of his contract, when sued for a breach of the contract, to say that the other party might have been relieved from the injunction in the injunction suit by producing and proving his contract.—*Ibid.*
7. An agreement to extend time of payment and forbear to sue a third person who is plaintiff's debtor, is a sufficient consideration for defendant's promise to pay; and no definite time of forbearance being named, a count on an agreement to forbear for a reasonable time is good.—*Calkins v. Chandler*, 320.
8. Complainant having left her husband on the ground that he was unfaithful to her, with the fixed purpose of remaining away from him permanently and filing a bill for a separate maintenance, made a criminal complaint and procured a warrant to issue against him for adultery; he was arrested, substantially *flagrante delicto*, and thereupon settled the criminal prosecution by giving, among other things, a bond secured by mortgage, conditioned to pay complainant two hundred dollars every six months during her natural life, and in case of default the round sum of five thousand dollars and all arrears of interest, as a gross amount; complainant then filed her bill for divorce on the ground of adultery, making no claim for any allowance, and obtained a decree, no defense being made; several payments of the semi-annual installments were made, but further payment at length being refused, the bill in this case was filed to foreclose the mortgage for the gross sum of five thousand dollars and back interest:—

Upon the question whether the mortgage was absolutely void and incapable of being enforced, or voidable only, and so confirmed by the subsequent acts of ratification and payment as to be rendered enforceable, the court was equally divided, GRAVES and CAMPBELL, JJ., holding it void, and COOLEY, CH. J., and MARSTON, J., holding it voidable only, and cured by ratification.—*Lyon v. Waldo*, 345.

9. Where a contract is tainted with illegal consideration it is rendered incapable of confirmation by acts of part performance, and whatever is done towards carrying it out is regarded as done under the obligation of honor, and not under the

- sanction or obligation of law, and what remains stands on the same basis.—Per GRAVES and CAMPBELL, JJ.—*Ibid.*
10. The defense of illegality is a peculiar one, and in its nature differs from most others; the objection is rather that of the public, speaking through the court, than of the defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy.—Per GRAVES and CAMPBELL, JJ.—*Ibid.*
 11. The legislative enactment confining the initiation of a criminal prosecution for adultery to the injured spouse, does not operate to take private compromises between the accuser and the accused of such prosecutions out of the general rule. The statute (*Comp. L. 1871, §§ 7870-2*) making provision for the settlement of certain minor prosecutions, requires the settlement to have the sanction of the court, and no express provision is made for the settlement of prosecutions for adultery.—Per GRAVES and CAMPBELL, JJ., COOLEY, CH. J., concurring.—*Ibid.*
 12. The reason for limiting to the injured spouse the right to move the criminal law in such cases, finds its proper bounds in considerations of family peace and the good of society, and it is incapable of being so far extended as to imply a right to resort to public prosecution to compel a division of property. The construction contended for, instead of favoring family peace and forgiveness and forbearance, would tend to encourage persecutions and plots and schemes unfriendly to domestic concord.—Per GRAVES and CAMPBELL, JJ.—*Ibid.*
 13. The complainant being justifiable at the time she caused the arrest of her husband in refusing to live with him longer and in demanding a reasonable separate maintenance, she might negotiate with the defendant respecting it, and unless fraud or duress was employed, the courts ought not to disturb their arrangements so far as respected the property.—Per COOLEY, CH. J., MARSTON, J., concurring.—*Ibid.*
 14. Duress is a good defense, if it is made in good faith and seasonably; but the misuse of legal process to obtain securities is to be regarded as a species of fraud; and where a party relies upon it in equity as a ground for avoiding his security, he is bound as in other cases of fraud to move promptly, and must not sleep on his rights; and if he goes on and by his conduct assumes the contract to be in force until the position of the other party to it has changed, he ought to be held to have affirmed it.—Per COOLEY, CH. J., MARSTON, J., concurring.—*Ibid.*
 15. The defendant in this case having for two years recognized the securities as valid, and made payments upon them, and complainant, relying upon the arrangement already made,

- having procured her divorce without asking for or obtaining any alimony, his course in allowing her to suppose he intended to recognize the validity of the securities, and in repudiating them only after in reliance upon this supposition she had lost other rights, works such a fraud upon her as deprives him of any consideration in equity.—Per COOLEY, CH. J., MARSTON, J., concurring.—*Ibid.*
16. MARSTON, J., holds that under our statute, adultery, although a felony, is an exception to the general rule, in that the injured husband or wife only has power to commence the prosecution, and that this gives the person aggrieved a control over the prosecution which is not given in any other class of felonies.—*Ibid.*
17. Defendant having purchased a sewing machine of plaintiff's agent, to be paid for in work, giving his note for the purchase price and receiving back from the agent an agreement to take the amount in work, to apply on the machine, it was held, in an action on the note, that the note and the other writing were to be construed together as one transaction, and that it was unimportant whether the labor was to be received by the company or its agent, so long as it was a fundamental part of the agreement that defendant should be allowed to pay in services and not be bound to pay in money.—*Singer Manufacturing Co. v. Haines*, 385.
18. In construing a contract all its parts must be examined, and effect given to every word and phrase if practicable; and where one clause of a contract provides expressly for complainant's paying over to defendant certain surplus moneys mentioned therein, a construction of another clause not clearly demanding it, such as to authorize the complainant to retain in his own hands the major part of that surplus, is not admissible.—*Vary v. Shea*, 388.
19. A provision in a contract that a party shall discharge his mortgage "at the expense" of the mortgagor, imports, in the absence of explanation, that he is to do it on being reimbursed the expense attending the drawing, execution and recording of the discharge, and not that he is to do it only on being paid the amount called for by the mortgage, as well as reimbursed such expense.—*Ibid.*
20. A person holding a mortgage covering two parcels of land having contracted with his mortgagor that as soon as he should receive deeds of the parcels covered by his mortgage he would convey to the mortgagor's wife one of said parcels, the mortgagor to retain possession of the other parcel until such time as the mortgagee sells the same, and to pay the mortgagee interest at the rate of ten per cent. on an amount equal to the face of the mortgage, from the time of the con-

veyance to his wife of the one parcel until the sale by the mortgagee of the other, it is held to be a fair inference from this agreement, that the parties contracted in contemplation that a foreclosure should be had, and that in consideration of the change made in the form of security, the mortgagee was to release from the lien of the mortgage the portion of the land promised to be conveyed to the mortgagor's wife.—*Clark v. Stilson*, 482.

21. A mortgagee having entered into such a contract with his mortgagor, if after a defective foreclosure he should deem it important for any purpose of his own to proceed to a new foreclosure for the correction of any error in his own proceedings, he could neither legally nor equitably charge his mortgagor with the expense thereof.—*Ibid*.

See ATTACHMENT, 8-11: COUNTY CLERK, 2: EVIDENCE, 16, 19: FRAUD, 7: INFANTS, 1-4: MISTAKE, 1: MORTGAGES, 4-7: MUNICIPAL CORPORATIONS, 2-8: PROHIBITORY LIQUOR LAW, 1-3: RECEPTORS, 1: SALES, 3, 4: SPECIFIC PERFORMANCE, 1-4: STATUTE OF FRAUDS, 6: STATUTE OF LIMITATIONS, 1: STREET PAVING, 1-6.

CONTROL.

See DELIVERY, 1.

CONVERSATIONS.

See CHARGE TO THE JURY, 8: WITNESSES, 2.

CONVERSION.

See ASSIGNMENT: FRAUDULENT CONVERSION, 1-3: STREET PAVING, 3, 5.

CONVEYANCE.

See GUARDIAN SALES, 3.

COPIES.

See CERTIFIED COPY, 1, 2: EVIDENCE, 1: PLATS, 1.

COPY DEED.

See EQUITY PLEADING AND PRACTICE, 3.

CORPORATE LIMITS.

See MUNICIPAL CORPORATIONS, 1-8.

CORPORATE POWERS.

See MUNICIPAL CORPORATIONS, 1-8.

CORPORATIONS.

1. It is not within the general power and province of the treasurer of a corporation, without special authority, to issue written admissions, which shall bind the company, of the amount due upon a disputed claim for salary of other agents of similar grade.—*Kalamazoo Novelty Manuf. Co. v. McAlister*, 327.
 2. In an action for a balance claimed to be due the plaintiff for services as superintendent of a corporation, a certificate by the treasurer of the company, who was also consulting director, that the company was indebted to plaintiff in a given sum for balance of salary, is not admissible in evidence as an admission binding on the company, in the absence of any showing of authority in such treasurer and consulting director to make such admissions.—*Ibid.*
- See BANKS, 1-5: DECLARATION, 1-5: EQUITY JURISPRUDENCE, 2-6: MUNICIPAL CORPORATIONS, 1-8: STREET PAVING, 1-6: WILLS, 5.

CORROBORATION.

See EVIDENCE, 16.

CORRECT DESCRIPTION.

See FORECLOSURES, 1.

COSTS.

See CONTRACTS, 21.

COUNSEL.

See PRACTICE IN CIRCUIT COURTS, 2.

COUNTY.

See MANDAMUS, 5: TAXATION, 5-9.

COUNTY BUILDINGS.

See MANDAMUS, 10, 11.

COUNTY CLERK.

1. Under the statute (*Comp. L. 1871, § 470*) a county clerk whose compensation has been fixed by the board of supervisors at a specified annual salary, is entitled to no additional compensation for services as clerk of the board of supervisors.—*Stetson v. Supervisors of Calhoun County*, 10.

2. A county clerk whose salary has been thus fixed is not entitled to recover extra compensation from the county for services as building committee, and in purchasing wood and trees, etc., except upon a showing of facts from which a contract for payment could be implied.—*Ibid.*
3. Notwithstanding the statute allows the county clerk specific fees for services as clerk in criminal cases, drawing juries, recording births, deaths, etc., it is competent for the board of supervisors to make an allowance by way of annual salary which shall be in full for all services he is required as county clerk to perform; and where the board have undertaken to do this, and the clerk is made to understand that such is their design, he cannot afterwards lawfully make claim to extra compensation for any of such services.—*Ibid.*

COUNTY SEAT.

See REMOVAL OF COUNTY SEAT.

COUPLED WITH AN INTEREST.

See ASSIGNMENT, 4-6.

COUNTY TREASURERS.

See MANDAMUS, 4, 5, 12, 13.

COUNTY TREASURY.

See FINES, 1.

CREDIBILITY.

See CHARGE TO THE JURY, 6.

CREDIT.

See BANKS, 3: SALES, 4: STATUTE OF FRAUDS, 2.

CREDITORS.

See FRAUD, 8: PARTNERSHIP, 1-3.

CRIMINAL LAW.

See FRAUDULENT CONVERSION, 1-3.

CRIMINAL PROSECUTIONS.

See CONTRACTS, 3-6.

CROP OF WHEAT.

See REPLEVIN, 4: SALES, 4.

CROSS BILL.

See EQUITY PLEADING AND PRACTICE, 5: MORTGAGES, 11, 13.

CROSS-EXAMINATION.

See CHARGE TO THE JURY, 6.

CURTILAGE.

A barn situated fifteen rods from the dwelling house, with a public highway passing between them, and a yard between the barn and the highway, is held not to be within the curtilage of such dwelling house.—*Curkendall v. People*, 309.

CUSTODIAN.

See SCHOOL DISTRICTS, 3.

CUSTOM.

See INSURANCE, 1.

CUTTING CEDAR POSTS ON SHARES.

See PARTNERSHIP, 1-4.

CUTTING TIMBER.

See TRESPASS TO LANDS, 1-4.

DAMAGES.

See ATTACHMENT, 6: MUNICIPAL CORPORATIONS, 7: TRESPASS TO LANDS, 1-4.

DATE.

See TAXATION, 1.

DEALING WITH CREDITORS.

See PARTNERSHIP, 2, 3.

DEATH.

Of guardian: See GUARDIAN SALES, 3, 4.

See EVIDENCE, 9, 10.

DEBT OF ANOTHER.

See STATUTE OF FRAUDS, 2-3.

56 MICH.—69.

DEBTOR'S ACCEPTANCES.

See PAYMENT, 2.

DEBTS.

Of dismembered district: See SCHOOL DISTRICTS, 10.

See GUARDIAN SALES, 1, 2.

DECLARATION.

1. In an action against a society for benefits claimed to be due from it under its articles of association and by-laws, a count which combines a cause of action for a monthly allowance based upon one set of regulations with a distinct cause of action upon another set of regulations for a round sum claimed to accrue to a retiring member, is held bad on demurrer for duplicity.—*Portage Lake Miners' & Mechanics' Benevolent Society v. Phillips*, 22.
2. A count for a recovery from a charitable society, under the by-laws, of an allowance on account of disability caused by injury, which is not supported by any averment of a demand, or of any assumpsit by the company, and which fails to state any facts on which the law might infer a liability in assumpsit, is demurrable; and an allegation that the company became indebted to and promised to pay plaintiff a specified sum as a consequence of his withdrawal, as provided by the by-laws, is not a statement of a cause of action.—*Ibid.*
3. In a count seeking to recover withdrawal money, which proceeds upon the theory that it is necessary as a condition precedent that a certificate of plaintiff's medical attendant be presented to the board of trustees and that they should have reasonable opportunity to act upon the case, it is essential that facts be set forth showing that opportunity was actually given the board to act upon the case, or that they refused or neglected to act.—*Ibid.*
4. A count which merely refers to certain supposed by-laws as entitling plaintiff to claim a specified sum in a given contingency, and in case of certain steps taken by him, without setting out the by-laws relied upon, or averring the necessary facts to justify the conclusion, is bad on demurrer.—*Ibid.*
5. The court cannot take judicial notice of the by-laws of a corporation, or assume that the company agreed, through a by-law, or otherwise, that upon plaintiff's disablement and withdrawal he should receive a specified sum of money, but the existence of such by-law or agreement must be averred, together with such facts as are essential to show that the defendant became liable under and by virtue thereof.—*Ibid.*

6. A count the gist of which is that the parties agreed to make a joint purchase of certain land, each to pay one-half the price, and that defendant made the purchase for fifteen hundred dollars, but represented to plaintiff that the price paid was two thousand dollars and thereby induced him to pay one thousand dollars instead of seven hundred and fifty dollars as his share, and which seeks to recover back the amount thus procured from the plaintiff in excess of his share of the actual purchase price, with interest thereon, embodies the substance of a good count in assumpsit, and may properly be joined with the common counts.—*Younj v. Taylor*, 25.
7. Under a declaration on the common counts in assumpsit, evidence of the use and occupation by defendants of the plaintiff's store under an agreement therefor at a specified yearly rental is held inadmissible and irrelevant.—*Heyerman v. Kanter*, 316.

See CHARGE TO THE JURY, 7: CONTRACTS, 7: EJECTMENT, 2: TRESPASS TO LANDS, 4.

DECREE.

In another suit: See EVIDENCE, 19.

See EQUITY JURISPRUDENCE, 9: EQUITY PLEADING AND PRACTICE, 1: FORECLOSURES, 4-6, 13-17: MORTGAGES, 12, 13.

DEDICATION.

See PLATS, 1.

DEEDS.

A deed executed in the state of New York before a commissioner of deeds in 1839, and to which is attached a proper clerk's certificate, made in 1841, certifying to the authority of such commissioner, and to the genuineness of his signature, and that the deed was executed according to the laws of New York, is held not open under the curative act of 1861 (*Laws of 1861, p. 16*) to objection that the deed had but one subscribing witness or that it was not acknowledged before the proper officer as provided by the laws in force at the time of its execution.—*Brooks v. Fairchild*, 231.

See DELIVERY, 1: EQUITY PLEADING AND PRACTICE, 3, 4: FORECLOSURES, 26-29: FRAUD, 1-5, 8: GUARDIAN SALES, 3: HUSBAND AND WIFE, 1-4: MORTGAGES, 3: TAXATION, 13-15.

DEFAULT.

See INSURANCE, 4.

DEFECTIVE FORECLOSURE,

See **CONTRACTS**, 21.

DEFECTIVE PROCEEDINGS.

See **AMENDMENTS**, 1-4.

DEFECTS.

See **DEEDS**, 1: **FORECLOSURES**, 22-30.

DEFENSE.

See **FINDING OF FACTS**, 6-8.

DEFICIENCY.

See **EQUITY JURISPRUDENCE**, 7: **FORECLOSURES**, 12, 13: **MORTGAGES**, 13.

DEFINING BOUNDARIES.

See **REPRESENTATIVE DISTRICTS**, 3.

DEFINITENESS.

See **WILLS**, 4.

DELAY.

See **AMENDMENTS**, 1, 4: **STATUTE OF LIMITATION**, 2, 3.

DELAYING CREDITORS.

See **FRAUD**, 8.

DELIBERATION.

See **MISTAKE**, 1.

DELINQUENT TAXES.

See **TAXATION**, 5-9.

DELINQUENT TAX RETURNS.

See **MANDAMUS**, 4, 5.

DELIVERY.

Where a husband has executed a deed to his wife, for the purpose of having her exhibit it to his creditor to induce him

to grant an extension, and has deposited it with his other papers in the house where she had access to it, to make use of it for the purpose for which it was made, to show ownership in herself, the legal control of it must be regarded as delivered to her; and this constitutes a delivery in law.—*Gage v. Gage*, 229.

See EQUITY PLEADING AND PRACTICE, 4: FRAUDULENT CONVERSION, 1-3: SALES, 1-4: WAIVER, 1, 2.

DEMAND.

See CERTIFICATES OF DEPOSIT, 1-4: DECLARATION, 2: PROMISSORY NOTES, 10: RECEIPTORS, 3, 4: STATUTE OF LIMITATIONS, 2-4.

DEMANDS NOT IN EXISTENCE.

See ASSIGNMENT, 5.

DE MINIMIS NON CURAT LEX.

See PRACTICE IN SUPREME COURT, 8.

DEMURRER.

See DECLARATION, 1-5: EQUITY JURISPRUDENCE, 6: PLEA IN ABATEMENT.

DEPOSITIONS.

See PRACTICE IN SUPREME COURT, 2.

DESCRIPTION.

Of premises: See FORECLOSURES, 1, 7: MORTGAGES, 1, 2, 14, 15.
See FORECLOSURES, 8, 9: REPLEVIN, 1-3.

DESIGNATION OF PLACE.

See REMOVAL OF COUNTY SEAT, 1.

DESTRUCTION OF BUSINESS.

See ATTACHMENT, 6.

DETERMINATION OF QUESTIONS OF FACT.

See ATTORNEYS, 4, 5.

DETROIT.

See STREET PAVING, 1-6.

DETROIT POLICE COURT.

See FINES, 4.

DIRECTORS.

See BANKS, 2-5: SCHOOL DISTRICTS, 1, 7-9.

DISAFFIRMANCE.

See INFANTS, 4.

DISBARRING AN ATTORNEY.

See ATTORNEYS, 1-7.

DISBURSEMENTS.

See SCHOOL DISTRICTS, 1-5.

DISCHARGE.

Of third person: See STATUTE OF FRAUDS, 1.

See CONTRACTS, 19: GUARDIAN SALES, 5: PROMISSORY NOTES,
9: SURETIES, 1.

DISCLOSURES TO AN ATTORNEY.

See WITNESSES, 2.

DISCONTINUANCE.

See AMENDMENTS, 5.

DISCRETION.

Of officers: See SCHOOL DISTRICTS, 8.

See EJECTMENT, 1: MANDAMUS, 5: MUNICIPAL CORPORATIONS,
4: PRACTICE IN CIRCUIT COURTS, 2, 5: SUPERINTENDENTS
OF THE POOR, 1: WILLS, 4.

DISCRETIONARY MATTERS.

See MANDAMUS, 3-5.

DISPUTE AS TO INTEREST.

See MORTGAGES, 8.

DISQUALIFICATION.

See DISSOLUTION OF ATTACHMENT, 1, 2.

DISSOLUTION OF ATTACHMENT.

1. On an application to dissolve an attachment, it is competent, where the only circuit court commissioner of the county is disqualified, under the statute (*Comp. L. 1871, § 5596-8*), to bring the matter, upon a proper showing, before the circuit court commissioner of an adjoining county. And a showing that the commissioner of the county is the law partner of the plaintiff's attorney, and that a portion of the papers in the cause were in his hand-writing, and that he had told defendant's attorney that he was interested as counsel and could not act as commissioner in the matter, is a sufficient showing of disqualification.—*Hayn v. Farrar, 258.*
2. The objection that the application in such case should have been made to the circuit judge, is held to be without force. The statute does not place applications to dissolve attachments on any different footing from other official action. And there is no special hardship in requiring a plaintiff who has sued out an attachment, which he cannot honestly do without means of proof of its propriety, to show that proof before an officer who must be presumed to be as competent in one county as in another.—*Ibid.*
3. The point that the proceedings before the commissioner should have been entitled in the original cause, is held not well taken. The proceeding is a special one, and the commissioner acts as an independent judicial officer, and not as a referee in the cause itself.—*Ibid.*
See ATTACHMENT, 1, 2.

DISTRICT BOARD.

See WILLS, 1-5.

DISTRICT MONEYS.

See SCHOOL DISTRICTS, 1-6.

DISTRICT OFFICERS.

See SCHOOL DISTRICTS, 1-6.

DISTRICTS.

See REPRESENTATIVE DISTRICTS, 1-3: SCHOOL DISTRICTS, 1-6.

DITCHES.

See MUNICIPAL CORPORATIONS, 5.

DIVISION OF PROPERTY.

See CONTRACTS, 12.

DIVORCE.

1. The charge in a divorce bill of living "in open and notorious adultery" with a person named, the time and place being given, is held to be sufficient. Such an allegation would require as satisfactory proof of the adultery as though a single offense only were charged, and in addition thereto evidence of the matter of aggravation.—*Marble v. Marble*, 386.
2. The evidence of adultery in this case is held sufficient and convincing, though it is circumstantial only.—*Ibid.*
3. Evidence of reputation is not admissible as substantive proof to show adultery, but it may be considered only as subsidiary and subordinate evidence, as matter in aid of and incidental to the substantive proof and going to explain and account for the conduct of the parties towards each other.—*Ibid.*
See CONTRACTS, 3.

DOCUMENTS.

See PRACTICE IN CIRCUIT COURTS, 3, 4.

DOUBLE FUNCTIONS.

See SCHOOL DISTRICTS, 6.

DOUBLY CHARGED FUND.

See FORECLOSURES, 3.

DOUBTFUL RIGHTS.

See MANDAMUS, 9.

DOWER.

- A married woman is not barred of her dower in lands whereof her husband was seized of an estate of inheritance during the marriage, and which he conveyed in his lifetime by deed in which she did not join, by reason of her having accepted the benefit of provisions made for her in the will of her husband; the statute (*Comp. L. 1871, § 4286*) requiring the widow to make her election between the provisions made for her in the will of her husband and her dower interest "in the lands of her husband," has reference only to such lands as the husband is seized of at his death.—*Westbrook v. Vanderburgh*, 30.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 1-3.

DRAINS.

See TOWNSHIP DRAIN COMMISSIONER, 1-4.

DUE.

See PROMISSORY NOTES, 6.

DUPLICITY.

See DECLARATION, 1.

DURESS.

See CONTRACTS, 13, 14.

DWELLING HOUSE.

See CURTILAGE.

EARNINGS.

See REQUESTS TO CHARGE, 1.

EJECTMENT.

1. Where in ejectment testimony offered to prove the value of the premises was objected to on the ground that no request in writing for such estimation had been filed, and thereupon plaintiff's counsel, claiming one had been duly filed, asked and was allowed to file such request *nunc pro tunc*, it is held that in the absence of any denial on the part of defendants, that such request had actually been filed at the proper time, or of any claim that the filing of the same *nunc pro tunc* took them by surprise or that they were unprepared then to meet the same, or of any request for a continuance on account thereof, the discretion reposed in the trial court was not abused and that the course pursued was proper.—*Brooks v. Fairchild*, 231.
 2. Where a declaration in ejectment alleges a joint title in all the plaintiffs, it cannot be sustained by proof of title of part of the premises in one only of the plaintiffs; and the statute (*Comp. L. 1871, § 6231*) has no application to such a case, but contemplates a case where one or more of a greater number of plaintiffs are found to have a right to the possession of the entire premises.—*Lynch v. Kirby*, 238.
- See EVIDENCE, 9, 11: LEASES, 5: SPECIAL QUESTIONS TO THE JURY, 1.

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ELECTION.

To declare whole due: See **MORTGAGES**, 8.
See **DOWER**.

EMANCIPATION.

See **EVIDENCE**, 18.

EMBEZZLEMENT.

See **EVIDENCE**, 17.

EMINENT DOMAIN.

The jurisdiction of the probate court in proceedings to condemn lands for railroad purposes, is dependent upon proof of a valid notice to the land owners, and notice mailed to a party whose residence was in fact, and was so alleged in the petition, at Aurora, New York, directed to him at Batavia, Cayuga county, New York, is void.—*Morgan v. Chicago & N. E. R. R. Co.*, 428.

EMPLOYER.

See **AGENCY**, 1-4.

EMPLOYES.

See **STATUTE OF FRAUDS**, 2, 3.

EMPLOYMENT.

See **ASSIGNMENT**, 4-6: **STATUTE OF LIMITATIONS**, 1.

ENLARGING BOUNDARIES.

See **REPRESENTATIVE DISTRICTS**, 1-3.

ENTIRE INSTRUMENT.

See **LEASES**, 2.

ENTIRETY.

See **FORECLOSURES**, 17: **SETTLEMENT**, 1.

ENTITLING.

See **DISSOLUTION OF ATTACHMENT**, 3.

EQUALIZATION.

See **TAXATION**, 2-4.

EQUITABLE ACTION.

See MONEY HAD AND RECEIVED, 1.

EQUITABLE INTEREST.

See ATTACHMENT, 8-11.

EQUITABLE LIEN.

See FRAUD, 6.

EQUITABLE MORTGAGE.

See VENDOR'S LIEN, 2.

EQUITABLE TITLE IN ANOTHER.

See GARNISHEE PROCEEDINGS, 1.

EQUITY JURISPRUDENCE.

1. Where pretended beneficiaries have slept upon their rights twenty or thirty years, and waited until it is fair to assume important primary evidence will be difficult of access, they have no claim upon the indulgence of courts of equity; it would be dangerous to imperil the stability of titles by listening to such stale claims.—*Loomis v. Brush*, 40.
2. A bill by a corporation against its former officers to recover moneys they are alleged to have wrongfully and fraudulently voted to themselves for services performed as such officers, and a further sum they are alleged to have wrongfully made by the use of the company's moneys, cannot be said to save a multiplicity of suits; it might, if sustained, enable complainant to unite in one suit several distinct causes of action against different parties, but uniting them would be as likely to create confusion as to save difficulty. And if the defendants combined in a fraud, they can be sued jointly at law as well as in equity.—*Bay City Bridge Co. v. Van Etten*, 210.
3. Though officers of a corporation undoubtedly act in a fiduciary capacity, and may be called to account in equity as trustees, yet when they have ceased to be officers, and the only complaint made against them is of an appropriation of the corporate funds to their own use, and no discovery is sought, the reasons for seeking the aid of equity which commonly exist in cases of breach of trust, are wholly wanting; the courts of law are perfectly adequate to give effectual relief, and they are the most suitable tribunals for the purpose.—*Ibid.*

4. A suit to recover moneys alleged to have been wrongfully taken, cannot be strictly called a suit for an accounting, any more than can any action for money had and received.—*Ibid.*
5. The remedy at law being ample, and the questions presented eminently proper for a jury to pass upon, no good reason is perceived for the retention of jurisdiction by the court of equity.—*Ibid.*
6. While the failure to show an amount in controversy sufficient to give the court jurisdiction might not render the bill demurrable, yet it might be sufficient reason for the court declining to entertain the case when the remedy at law is entirely adequate.—*Ibid.*
7. The interference by parties interested in a chancery foreclosure sale to prevent a fair and usual sale to the highest bidder, as by making arrangements with persons who intended to bid at the sale to protect their interests, whereby they were deterred from bidding, is enough of itself to estop them from claiming a deficiency on the sale, which they have been the means of creating; and their action at law for an alleged deficiency so created will be enjoined in equity.—*Innes v. Stewart, 285.*
8. A person having conveyed his farm to his wife, the two joined in a mortgage thereof for six thousand dollars running for five years; the wife thereupon gave back to her husband a contract to reconvey to him on his paying the mortgage in five years, and also giving him the right to hold possession during the five years; attachments against the husband were levied upon the farm as real estate; the attachment debtor made assignments of his contract, and quit-claimed the farm to his wife; bankruptcy proceedings were instituted against him, which resulted in an adjudication of bankruptcy; the rights of the attaching creditors, the wife under the quit-claim deed, and the assignees of the contract, came before the bankruptcy court for determination, and it was there held the bankrupt's rights consisted, *first*, of a right to have conveyance of the farm provided he paid the mortgage in five years; and *second*, the right of possession during that term; and the right of the assignee in bankruptcy to the possessory right was sustained as subject to sale absolutely, but the interest in the farm under the stipulation for reconveyance was held to be subject to the attachment levies; the assignee in bankruptcy thereupon sold his interest in the farm and products; judgments were rendered in the attachment causes, executions issued and levied on the farm as real estate, and sales made; the titles of the purchasers at the assignee's sale and of the bankrupt's wife having been brought

together in complainant, he filed this bill to quiet his title against said attachment and execution levies and sales:—

Held, That the determination of the bankruptcy court upon the rights of the parties is binding and conclusive upon them; that the evidence is satisfactory as to complainant's possession and in regard to his ownership of an interest to entitle him to bring this bill; and that if the proceedings in the attachment causes are insufficient in law to bind any interest in the farm, and only give a color of right, and finally prejudices complainant's title only as they becloud it, their power to so operate ought to be taken away.—*Grover v. Fox*, 453.

9. On a bill to redeem from an irregular foreclosure, the foreclosure proceedings being found invalid, the decree should provide for redemption from the mortgage as an unenclosed security, and not from the void sale; and in determining the amount to be paid on such a redemption, it is erroneous to make a rest in computing interest at the date of the sale; and the decree should provide for a sale as on foreclosure to produce satisfaction, in the event of failure to redeem.—*Grover v. Fox*, 461.

See ASSIGNMENT, 5: ATTACHMENT, 9-11: ATTORNEYS, 1, 2: BONA FIDE PURCHASERS: CONTRACTS, 4-6: EQUITY PLEADING AND PRACTICE, 5: FRAUD, 1-6, 8: HUSBAND AND WIFE, 1, 3, 4: MISTAKE, 1: MUNICIPAL CORPORATIONS, 8: SPECIFIC PERFORMANCE, 1, 4.

EQUITY PLEADING AND PRACTICE.

1. A decree entered within two weeks after the cause was put at issue, the record not showing that the cause was brought to a hearing by stipulation, or that the defendant was present at the hearing or had notice thereof, is held to have been prematurely entered.—*McKinney v. McKinney*, 37.
2. Upon an application for further time to take additional testimony upon the subject matter of amendments to the bill and answer, made with leave at the hearing, the showing should point out what facts were expected to be proved, so that the court could determine upon their relevancy and importance. And where a party has failed in his showing for time to take proofs out of court, permission to him to take further proof in open court at the hearing, being a provision to that extent in his favor, will authorize no complaint on his part.—*Slater v. Breese*, 77.
3. The attaching to an answer of what is alleged to be a copy of a deed, upon which the defendant bases certain claims, operates only to amplify the pleading; and the deed is not

thereby proved and made evidence in the case.—*Shepard v. Shepard*, 173.

4. The complainant, having planted himself on the non-delivery of the deed, must fail in his suit to set aside the conveyance when delivery is made out.—*Gage v. Gage*, 229.
5. Affirmative relief will not be granted to defendants in a chancery cause, in the absence of any cross-bill.—*Vary v. Shea*, 388.
6. While an answer called for on oath is to be received as true so far as it is responsive to the averments of the bill, affirmative matters of defense which are thus set up must be proved.—*Hart v. Carpenter*, 402.

See ATTORNEYS, 1, 2: DIVORCE, 1: FORECLOSURES, 1-7: MORTGAGES, 11-13.

ERROR CURED.

See CHARGE TO THE JURY, 7.

ERROR NOT PRESUMED.

See PRACTICE IN SUPREME COURT, 1, 3.

ERRORS THAT DO NOT PREJUDICE.

See TOWNSHIP DRAIN COMMISSIONER, 4.

ESTABLISHING DRAINS.

See TOWNSHIP DRAIN COMMISSIONER, 3.

ESTATES OF DECEASED PERSONS.

1. The duty of commissioners on claims in the probate court to report the proof of a contingent claim presented to them, is not judicial, but ministerial, and its omission cannot be remedied, rectified, or redressed by appeal; its observance must be enforced by warrant (*Comp. L. 1871, § 5200*), or by *mandamus*, or by attachment, or the proof must be supplied, if necessary, in some special way.—*Buchos v. Pray*, 429.
2. The right of appeal from claim commissioners to the circuit court, is given and governed by *chapter 158, Comp. L.*, and not by *chapter 177*, which contains provisions about appeals from certain rulings and decisions of the judge of probate.—*Ibid.*
3. An appeal from commissioners to the circuit court does not lie in case of contingent claims not asserted or capable of being asserted as absolute.—*Ibid.*

4. The commissioners have no power to adjudicate upon contingent claims; their duty in regard to them is to hear the proofs and report the same to the probate court (*Comp. L. 1871, § 4464*) to the end that that tribunal, having the facts before it, may require the representatives to retain assets against the possibility of their being needed upon the claim (§ 4465), and provision is made for a hearing and adjudication upon the claim afterwards when it shall have become absolute (§ 4466), and from its allowance or disallowance then, an appeal is provided for.—*Ibid.*

ESTOPPEL.

See CONTRACTS, 8-16: EQUITY JURISPRUDENCE, 7: INSURANCE, 3.

EVIDENCE.

1. Copies of instruments entered upon the registry of deeds, though not executed in a manner to entitle them to record under the registry laws so as to become evidence as records, may nevertheless properly be used as secondary evidence of the contents of originals, which are shown to have existed and to have been lost or destroyed.—*Post v. Rich, 16.*
2. The admission of secondary evidence of the contents of a letter against the objection that the loss of the letter was not sufficiently shown, will not be held error where the evidence of its loss was sufficient to make out a *prima facie* case, and where the party objecting made no cross-examination as to the thoroughness of the search which had been made.—*Bottomley v. Goldsmith, 27.*
3. Where the record of the judgment in another cause is introduced in evidence in a cause, parol evidence is not admissible to supply jurisdictional defects. The record must be complete in itself.—*Montgomery v. Merrill, 97.*
4. A more general proposition in so many words to make out the case set forth in the declaration, is not one that the court is bound to take into consideration and rule upon as an offer of proof; it is no more than the declaration has already proffered, and in better form.—*Reynolds v. Continental Ins. Co. 131.*
5. Where in an action to charge an insurance company upon an alleged agreement for insurance, claimed to have been made with their agent, the case has failed for lack of proof of authority in the agent to take the specific risk, and the plaintiff has been three times upon the stand as a witness and has testified to the payment of the premium to the agent but that he did not know whether the agent had paid it over

- to the defendant, the rejection, at the close of the trial, of a general offer to prove by the plaintiff as a witness the necessary facts to entitle him to recover of defendant, etc., and "that they received the money for the insurance and kept it," is not error, where the offer is so presented as fairly to appear rather as a compendious reassertion of positions already ruled, than as a regular offer of proof of facts to make out a case.—*Ibid.*
6. The court cannot take judicial notice of the relative situation of lots and blocks on a map or plat which is not introduced in evidence, or as to how they apply to the ground.—*Shepard v. Shepard, 173.*
 7. Where a father had deeded premises to his sons, which the latter had afterwards reconveyed to him for the purpose of enabling him to mortgage the same to secure a debt, and these facts were made known to the mortgagee at the time, a strong showing will be required to make out the defense on the father's testimony on behalf of his sons, that the property had been reconveyed to them by him prior to the mortgage by a deed which was not of record, and that the mortgagee was informed of this deed but conspired with the father to defraud his sons by taking the mortgage and placing it on record in advance of their deed.—*Ibid.*
 8. Blind remarks and ambiguous and misleading hints as to the state of the title, which were not understood by the mortgagee to have the meaning that is afterwards sought to be put upon them, are not very conclusive as a showing of notice of an unrecorded deed which is claimed to have been the result of a sudden change of plans of which the mortgagee had no notice.—*Ibid.*
 9. In an action of ejectment by parties claiming through the heirs of one who is asserted to be deceased, oral evidence indirectly proving death is admissible, consisting of those circumstances from which the death of the person may be reasonably inferred, such as long absence without any intelligence from him, reputation in the family, and their conduct thereupon, and other circumstances.—*Bailey v. Bailey, 181.*
 10. The presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to be living; and when it is sought to prove death within that period by circumstantial evidence, there must be a showing of diligent inquiry at the last place of residence, and among relatives, and any others who probably would have heard of the person if living, and also at any known place of fixed foreign residence.—*Ibid.*
 11. In ejectment for an undivided interest in lands to which the

- defendants claim the entire title, evidence of proceedings by defendants to recover possession of the entire premises under a lease, and also that, although informed that plaintiffs claimed an interest, they insisted upon obtaining and taking actual and exclusive possession of the entire premises and excluding the plaintiffs, is admissible as tending to prove ouster under the statute.—*Comp. L. 1871, § 6228.—Ibid.*
12. Neighbors who have employed servants to do like work are competent to testify to the value of the services of a girl employed to do housework.—*Carter v. Carter, 207.*
 13. In a suit brought by an administrator, questions relating to payment made after suit brought or at the commencement of suit, as to a payment made to agents of the deceased, are not within the provision of the statute (*Comp. L. 1871, § 5968*) excluding evidence of matters equally within the knowledge of the deceased.—*Jones v. Beeson, 214.*
 14. Questions, in order to fall within that objection, must be distinctly aimed at such matters as appear affirmatively to have been within the knowledge of the deceased; and in case of questions that relate to matters that may or may not have been known to the deceased, the proper course, on objection being made, is to require them to be so limited as to avoid the difficulty.—*Ibid.*
 15. Where in introducing evidence as to the legality of certain school taxes it becomes material to show that certain lands are within a particular school district, that fact may be proved by parol.—*Brooks v. Fairchild, 231.*
 16. In an action to recover the amount of certain orders drawn on defendant by a firm who were managing for him a lumber camp, for the payment of men employed in the camp, and which the plaintiff claims to have cashed at defendant's request and on his promise to repay the sums so advanced, the defense being that defendant had made no such arrangement with plaintiff and had no concern with the payment of the men, and that his relations to them were inconsistent with his assuming to become liable as claimed, the written contract between defendant and said firm, which contemplated defendant would or might look after the wages of the men, is held to be relevant and material evidence for the plaintiff.—*Comstock v. Norton, 277.*
 17. In an action by a father to recover on the common counts for services of his minor son in peddling beer, it appearing that the son undertook to answer for any beer he should carry out and for which he should fail to bring back beer tickets or cash, it was competent for the defense to show that the son proved dishonest and embezzled from defendant more than the amount of his unpaid wages.—*Schoenberg v. Voigt, 310.*

18. It being urged as a defense that the son was emancipated by the father before he engaged with defendant, the exclusion of an inquiry as to whether the son did not ask and obtain permission of his father when he went into service of another person named, will not be held error, where the record does not disclose at what time such other service was entered into, or how long prior to the engagement with defendant; emancipation may take place suddenly and by express arrangement, or it may occur gradually and by conduct implying mutual assent, and even in the latter case it may be brought about in a short time.—*Ibid.*
19. In an action to recover damages for the breach of a contract whereby defendant agreed to allow and permit plaintiff to make, construct and use a certain improvement in artificial gums and palates in his profession of dentistry, the breach alleged being the suing out of an injunction, the decree in the injunction suit would not be admissible in evidence as a bar to the present suit where the same was not set up or relied upon in the pleadings.—*Sullings v. Goodyear Dental Vulcanite Co.*, 313.
- See AGENCY, 1-4: ATTORNEYS, 2: BANKS, 1, 5: CERTIFIED COPY, 1, 2: CHARGE TO THE JURY, 1-6, 8: CORPORATIONS, 1, 2: DECLARATION, 7: DEEDS, 1: DIVORCE, 1-3: EJECTMENT, 1, 2: EQUITY PLEADING AND PRACTICE, 3: FORECLOSURES, 19-21: GUARDIAN SALES, 6: INSURANCE, 1, 2: MISTAKE, 1: MONEY HAD AND RECEIVED, 2, 3: MORTGAGES, 1, 2: PAYMENT, 1: PLATS, 1: PRACTICE IN CIRCUIT COURTS, 3, 4: PRACTICE IN SUPREME COURT, 2, 3, 5-7, 9-11: PROMISSORY NOTES, 1, 2, 4, 7, 8: RAPE, 1-4: RECEIPTS, 1-4: SPECIFIC PERFORMANCE, 2-4: TRESPASS TO LANDS, 1-3: WITNESSES, 1, 2.

EXCEPTIONS.

See FINDING OF FACTS, 1: FORECLOSURES, 6.

EXCESS.

See FORECLOSURES, 6: MORTGAGES, 7.

EXCESSIVE LEVY.

See FINDING OF FACTS, 2: TAXATION, 11.

EXCESSIVE TAX.

See TAXATION, 4.

EXCLUSION OF EVIDENCE.

See PRACTICE IN SUPREME COURT, 5.

EXCUSE.

See AMENDMENTS, 4.

EXECUTION.

See PLATS, 1.

EXECUTIONS.

1. The seizure on execution from a federal court, of property of a stranger to the writ, will not operate to bring the property within the exclusive jurisdiction and control of the United States court, at least not in the absence of any judgment to support it.—*Heyman v. Covell*, 157.
2. The taking by virtue of an execution of property not belonging to the execution debtor, is tortious and a trespass, though the writ be a valid one; and a seizure upon a writ issued without any judgment or order of the court to support it, could have no force in fixing the forum for determining the right of property.—*Ibid.*
3. An execution purchaser can obtain no better right than the judgment debtor had at the time of the levy.—*Clark v. Stilson*, 462.

See ATTACHMENT, 2, 7-11: EQUITY JURISPRUDENCE, 8: PLEA IN ABATEMENT, 1: RECEPTORS, 1-4: VENDOR'S LIEN, 1, 2.

EXECUTION SALES.

See MANDAMUS, 7, 8: VENDOR'S LIEN, 1, 2.

EXEMPTION.

See HOMESTEAD, 1, 2.

EXERCISING POWER BEYOND THEIR LIMITS.

See MUNICIPAL CORPORATIONS, 1-8.

EXISTENCE OF COUNTY.

See MANDAMUS, 11.

EXISTING EMPLOYMENT.

See ASSIGNMENT, 4-6.

EX PARTE AMENDMENTS.

See AMENDMENTS, 6, 7.

EXPENSES.

See CONTRACTS, 1, 9: TAXATION, 11.

EXTENSION.

Of village limits: See HOMESTEAD, 2.

See CONTRACTS, 7: MORTGAGES, 18: PROMISSORY NOTES, 9:
STATUTE OF FRAUDS, 6.

EXTRA COMPENSATION.

See COUNTY CLERK, 1-3.

EXTRAORDINARY CONTINGENCIES.

See MUNICIPAL CORPORATIONS, 6.

EXTRINSIC PROOFS.

See MORTGAGES, 1, 2.

EXTRINSIC SHOWING.

See AMENDMENTS, 1.

FACTS AND CIRCUMSTANCES.

See AFFIDAVIT FOR CAPIAS.

FACTS ESTABLISHED BELOW.

See MANDAMUS, 6-8.

FAIR SALES.

See EQUITY JURISPRUDENCE, 7.

FALSE DEED.

See FORECLOSURES, 26-29.

FALSE REPRESENTATIONS.

See FRAUD, 1-5, 7.

FARM.

See HOMESTEAD, 2.

FATHER AND SON.

See CONTRACTS, 1, 2: EVIDENCE, 17, 18: REQUESTS TO
CHARGE, 1.

FEDERAL COURTS.

See EXECUTIONS: PLEA IN ABATEMENT, 1.

FELONIES.

See CONTRACTS, 16.

FENCES.

See LINE FENCES, 1, 2.

FENCE VIEWERS.

See LINE FENCES, 1.

FIDUCIARY CAPACITY.

See EQUITY JURISPRUDENCE, 3.

FILES.

See FORECLOSURES, 29.

FILING.

See CHATTEL MORTGAGES, 1.

FILING DEED.

See FORECLOSURES, 28, 29.

FINDING OF FACTS.

1. Where a case rests upon exceptions to conclusions of law in a special finding, the exceptions must stand or fall by the finding of facts.—*Upton v. Kennedy*, 215.
2. A finding upon the validity of tax conveyances, which shows that the sum of sixteen hundred and sixty-three dollars and thirty-seven cents, for county taxes, and five hundred dollars for township contingent fund, were duly authorized to be raised, and which further finds "that one thousand dollars was raised on the roll of said township" for the year in question, but fails to state for what, is held to be open to the construction that the town raised less money than was authorized, instead of more.—*Ibid.*
3. Every finding is the responsible act of the judge, and it is not important by what name it is called by him; if his mind has reached conclusions which involve questions of fact, they must prevail, even though mixed with legal inquiries, unless illegally reached.—*Gillam v. Boynton*, 236.

4. All conclusions of fact found by a referee are conclusive in a court of review; and his finding that defendants were not partners, can only be disturbed if the facts found by him necessarily created a partnership.—*St. Denis v. Saunders*, 369.
5. And if there was no partnership in fact, the effect of the apparent indications, if warranting any inference, would raise an inference of fact, and where the referee has drawn his own inferences of fact, they cannot be disturbed on review.—*Ibid.*
6. In an action upon a promissory note to which the only defense was that it was void under the prohibitory liquor law, a finding of facts which states simply with reference to this defense, that the payee was a grocer and that four dollars of the consideration of the note was for intoxicating liquors which the maker got at the payee's store, is not sufficiently specific and definite to support a judgment that the note was void.—*Brown v. McHugh*, 433.
7. The judgment must find its support in the actual state of facts ascertained and reported; and no aid can be derived from facts not embodied in the finding, nor can facts of equivocal import be reduced to certainty by conjecture, or a ground of illegality be presumed.—*Ibid.*
8. If the intoxicating liquor mentioned in the finding in this case was native wine or beer, and was sold in lawful quantities, the charge for it was not unlawful, and the note was not tainted by it; and there are no facts found to show that the liquor belonged to the forbidden class, and was not of the sort tolerated by the statute.—*Ibid.*

See CONTRACTS, 3: LINE FENCES, 1: PRACTICE IN SUPREME COURT, 9, 10: TAXATION, 11.

FINDING OF JURY.

See TOWNSHIP DRAIN COMMISSIONER, 2.

FINES.

1. Fines collected by the city authorities of Bay City on prosecutions before the recorder for violations of city by-laws do not belong in the county treasury.—*Fennell v. Common Council of Bay City*, 186.
2. The term "penal laws" in the constitutional provision (*Art. XIII*, § 12), requiring all fines assessed and collected in the several townships for any breach of the penal laws to be exclusively applied to the support of libraries, refers to the laws of the state for the preservation of public order and which are enforced by the state authorities; and this provision does not extend to the numerous forfeitures and penalties growing out of breaches of duty that partake of the nature

- of a civil grievance or a merely local wrong, and which do not come within the category of criminal conduct.—*Ibid.*
3. And all penalties which are fixed by and imposed under the city by-laws stand on the same footing in regard to the disposition of the proceeds; and the circumstance that like offenses are punishable also under state legislation, whether identically or otherwise, does not affect the question under consideration.—*Ibid.*
 4. These fines are distinguishable from those collected by the police court of Detroit, which was a creature of the statute, having no jurisdiction to impose any penalties but those defined by the law itself; its authority being distinctly statutory and the penalties being neither imposed nor governed by ordinances.—*Ibid.*

FLOATING RIGHT.

See LEASES, 5.

FORBEARANCE.

See CONTRACTS, 7: STATUTE OF FRAUDS, 6.

FORCE.

See RAPE, 2-4.

FORECLOSURES.

1. Where a mortgage is inaccurate in its description of premises, and has some elements that have to be rejected as surplusage, but the description is nevertheless sufficient, in the light of the extrinsic facts, to identify the property intended, it is proper in a bill to foreclose the mortgage to describe the property actually mortgaged by a description which is accurate; and the variance in terms from the description in the mortgage is unimportant.—*Slater v. Breese*, 77.
2. The right to grant amendments at the hearing in the court of first resort is much broader than in an appellate court, and is more a question of terms than of power, where the amendment is germane to the controversy and calculated to help to a better or more complete result; and where the complainant in a foreclosure bill held subsequent mortgages not referred to in his bill, and the answer of a defendant brought in as a subsequent incumbrancer referred to such intervening mortgages, and based asserted equities upon their existence, it is competent to permit complainant to so amend his bill at the hearing as to make it aver the facts as to these mortgages.—*Ibid.*

3. It is a maxim of equity, that where one has a lien on two funds, and another a later lien on one of them, the former is bound to exhaust the singly charged fund before resorting to that which is doubly charged; but this maxim will not aid a third mortgagee of a portion of the premises covered by the first mortgage to drive the first mortgagee to sell first a parcel on which he also holds a second incumbrance and which is not included in the third.—*Ibid.*
4. Where a portion of the mortgaged premises is covered by a second mortgage held by the complainant, and another portion by a third mortgage held by a defendant, the latter cannot complain that on a bill to foreclose the first mortgage the decree provides for the sale first of the parcel covered by the second mortgage, but requires the sale of that parcel to be subject to the payment of the second mortgage.—*Ibid.*
5. A third incumbrancer who concedes the existence of a second incumbrance is not entitled as matter of right, upon the question of the order of sale upon foreclosure of the first mortgage, as between the parcel covered by his incumbrance and that covered by the second incumbrance, to introduce proofs to show that the amount of the second incumbrance is less than it is represented to be.—*Ibid.*
6. Where the amount due upon a mortgage foreclosure has been found and reported by a commissioner to whom the case was referred for that purpose, and the court in decreeing the amount has acted on such report, a defendant who has taken no exception and made no objection to the report, cannot on appeal assail the decree as being excessive in the matter of the allowance of interest.—*Ibid.*
7. The fact that a foreclosure bill describes the premises mortgaged in different terms from those used in the mortgage itself, is of no consequence, where the mortgage is sufficiently identified and the premises described in the bill are substantially the same as those described in the mortgage. If either party desires a judicial settlement as to what precise parcels the description attached to, a proper case therefor should be made and be followed by the proper proof.—*Shepard v. Shepard*, 173.
8. A bill in equity having been filed to foreclose a mortgage covering real and personal property, and a receiver having been appointed and having taken possession of the personal property, it was held, in a replevin suit afterwards brought against such mortgagee and receiver by a subsequent purchaser from the mortgagor, who had been made defendant to the foreclosure bill, that the question of the sufficiency of the description of the property in the mortgage to affect a

- purchaser with only constructive notice, and whether such subsequent purchaser had any actual notice, were questions to be raised in the first suit, and not by attacking the proceedings therein through an action at law; that the same question could not be tried in both suits, and much less could a party remove it from one court to another in this collateral way.—*Austin v. French*, 199.
9. The question of the validity of the mortgage as a lien on the property intended by it in the hands of the plaintiff in replevin, belonged to the court of chancery in the foreclosure suit; in the replevin suit the plaintiff must recover, if at all, by establishing the fact that the property described in the writ was property not covered by the mortgage. And as to any property embraced in the mortgage, the replevin suit must fail.—*Ibid.*
 10. A complainant who has purchased at foreclosure sale and afterwards conveyed to a third party, would be injuriously affected by an order setting aside the sale under which he acquired the title which he afterwards parted with, and has an interest in the matter sufficient to support an appeal.—*Lawrence v. Jarvis*, 281.
 11. On a motion to set aside a foreclosure sale, when it appears that third parties have acquired rights in the premises under the sale sought to be set aside, no further proceedings should be taken until they have notice and an opportunity to be heard.—*Ibid.*
 12. Under the statute (*Comp. L. 1871, § 5149*) leave of the court where the foreclosure was had, is essential to justify proceedings at law to recover a deficiency on a mortgage foreclosure in chancery.—*Innes v. Stewart*, 285.
 13. A personal decree cannot lawfully be rendered against a defendant brought in by publication, but who has not been served with process or appeared in the cause.—*Ibid.*
 14. It is competent for the court in foreclosure cases to make a decree without a reference to compute the amount due: and the court should always pass for itself on the testimony.—*Vaughn v. Nims*, 297.
 15. While the statutes and practice under them require a new inquiry into any installments accruing after decree (*Brown v. Thompson*, 29 *Mich.*, 74), the practice has always prevailed of giving decree for every thing due at the time it is granted, and it is sanctioned in this case.—*Ibid.*
 16. It is competent for a mortgagee to protect his mortgage interest against taxes, and the amount so paid may properly be included in a foreclosure decree.—*Ibid.*
 17. A decree allowing a sale as an entirety will not be disturbed for that reason, where the land was originally described as

- one lot, and there is no showing that it should be sold in parcels.—*Ibid.*
18. The mortgagor being entitled under the statute (*Comp. L.*, § 6263) to the possession, and consequently to the rents and profits of the mortgaged premises, until such time as his title is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver appointed in the foreclosure suit.—*Wagar v. Stone*, 364.
 19. Where in defense to a foreclosure bill the existence of paramount outstanding titles to a portion of the lands against which the mortgagee had covenanted by warranty deed of the premises to the mortgagor, is set up, and the payment by the mortgagor to an adverse claimant of a sum which the mortgagee consented should be applied on the mortgage, evidence by the mortgagor, after the death of the mortgagee, of admissions by the latter of the defects in his title and of his consent to application on the mortgage of an amount paid by the mortgagor to an adverse claimant, is held inadmissible under the statute (*Comp. L.* 1871, § 5968) as relating to matters which in his lifetime was equally within the knowledge of the mortgagee, and properly disregarded by the court below.—*Hart v. Carpenter*, 402.
 20. The sum thus paid out by the mortgagor having been paid in settlement of a dispute growing out of the cutting of timber by a third party on the mortgaged lands, which settlement left a large amount of timber in the mortgagor's hands ready for working up, and the fact that this was cut without expense to him having been taken into account in the settlement, in the absence of evidence of any understanding with the mortgagee that this payment should be applied on the mortgage, or of any reason which in law or in morals should require him to consent thereto, the court will not assume that he so agreed, nor compel the application of such payment on the mortgage.—*Ibid.*
 21. The defense that a parcel claimed to have been twice described in the deed of conveyance from the mortgagee to the mortgagor, was twice taken into account in fixing upon the amount of the mortgage, cannot prevail in the absence of proof of the fact.—*Ibid.*
 22. In executing the power of sale in a mortgage the statutory proceeding must comply substantially with all the conditions set by the legislature, and those who conduct the foreclosure must observe good faith, and pay a proper regard to the interests of all who may be affected by the proceedings; and no defect or misstep in matters of substance will be cured or excused by any proof that it happened by mistake and was not induced by a bad purpose.—*Grover v. Fox*, 461.

23. An offer to the mortgagor to give him time within which to redeem from foreclosure sale the whole or part of the premises cannot avail to correct illegalities, or to preclude the mortgagor from taking advantage of them and demanding to redeem as matter of right; and the limit of time proposed for redemption in this case, being but ten days, was inequitable.—*Ibid.*
24. The query is suggested, whether where premises are composed of contiguous parcels, occupied together as a single farm, a sale in parcels is essential to a valid foreclosure.—*Ibid.*
25. The sale having been made in parcels, however, if incapable of being sustained as a sale in parcels, it cannot stand as a valid sale in bulk; the sale must be contemplated as it was, rather than as it was not.—*Ibid.*
26. A deed which represents the sale as one made in bulk for a single bid, is not a proper one where the sale was in fact in separate parcels and for several bids.—*Ibid.*
27. Though the statute makes no express requirement that the deed executed and delivered on foreclosure sale shall be acknowledged, or have appended a certificate of acknowledgment, yet in view of the fact that the statute contemplates that the deed when placed on file shall be complete and in a condition to be recorded, in case redemption is not made, and considering the established practice in that regard, it is deemed essential.—*Ibid.*
28. A deed executed and put on file ten months after the sale and falsely ante-dated and acknowledged as of the day of the sale, is not a valid foreclosure deed.—*Ibid.*
29. Where on a foreclosure sale made in parcels a deed is made and filed in proper time, but which misrepresents the sale as one made in bulk and for a single bid, and thereupon, after ten months, a new deed is executed, properly representing the sale as one made in parcels, but which is ante-dated and purports to have been acknowledged on the day of the sale, and this, too, is put on file, the proceedings thereby become so duplicated and ambiguous as to be void. Parties are entitled to have the papers on file of themselves identify the sale and convey distinct information, without the aid of extrinsic inquiries as to the time and manner of the sale and the price or prices bid.—*Ibid.*
30. Where a foreclosure sale is made in parcels, when enough parcels have been sold to satisfy the mortgage debt and all costs and expenses, the power of sale is exhausted, and affords no authority to make further sales of the remaining parcels.—*Ibid.*
31. The requirement that a foreclosure sale shall be made in parcels is in the interest of parties entitled to redeem, and to protect their right to redeem each parcel separately; but

where a party has in advance for a valuable consideration agreed to waive his right to redeem, he cannot object that the sale was not made in parcels; and this objection cannot be taken by the mortgagee to his own proceedings, where no one else is in position to make it.—*Clark v. Stilson*, 482. See CONTRACTS, 20, 21: EQUITY JURISPRUDENCE, 7, 9: GROWING CROPS, 1-3: MORTGAGES, 11-13, 17.

FOREIGN CORPORATIONS.

See PROMISSORY NOTES, 4.

FORFEITURES.

See FINES, 2: INSURANCE, 4-9: MUNICIPAL CORPORATIONS, 7

FORMAL MATTERS.

See TAXATION, 15.

FORMING NEW DISTRICTS.

See SCHOOL DISTRICTS, 10.

FORM OF CERTIFICATE.

See CERTIFIED COPY, 1, 2.

FORUM.

See EXECUTIONS, 2: PLEA IN ABATEMENT, 2.

FRAUD.

1. A deed fraudulently obtained of one who had before conveyed to another by a deed not of record, by false representations that it was being procured by and for the protection of the party holding under such prior unrecorded deed, does not vest in the grantee any title, as against the real party for whose benefit the grantor undertook and designed to make the grant; such fraudulent grantee is held to be a mere trustee for the party really intended by the grantor to be benefited.—*Hanold v. Bacon*, 1.
2. Arrangements fraudulently brought about to sell to the rightful owner a pretended title thus obtained in fraud of his rights, cannot be sustained as compromises of conflicting claims.—*Ibid*.
3. The rightful owner of lands, who has given a mortgage in purchase of a pretended title thus fraudulently obtained and set up against him, is not bound to reconvey before he is entitled to have the mortgage procured by such deceit and extortion decreed to be canceled.—*Ibid*.

4. One who has before sold and deeded lands has no right to convey them a second time; and it is an actionable wrong in him to so convey them intentionally as to cut off his former conveyance.—*Ibid.*
5. It is only equitable rights that a court of equity will recognize and enforce; and that which originated in a fraud, and can be used only for fraudulent purposes, cannot be put forward as an equity.—*Ibid.*
6. A bill to establish and enforce an equitable lien for a portion of the purchase price of certain primary school lands, brought by an intermediate owner of said lands against his vendee, is sustained upon proofs showing that after the original purchase and an assignment of a portion by the original purchaser through mesne conveyances to the complainant, and a sale by complainant of his portion to defendant, with delivery of possession, the defendant, through collusion with the original purchaser, procured new certificates from the state land office to himself and such original purchaser for their respective interests; and that defendant afterwards, upon a settlement with complainant, assigned to him all defendant's interest in these lands as security for payment of the amount due him, though this assignment is repudiated by defendant as having been executed on Sunday and under threats of criminal prosecution.—*Jones v. Sackett*, 192.
7. One who gave a purchase money mortgage for lands which he had purchased and gone into possession of five years before, cannot defeat or reduce the amount of such mortgage upon a showing that he was defrauded in the purchase by false representations regarding the lands and the crops thereon, where the deception complained of was such that he must have discovered it before giving the mortgage. A party seeking to avoid his contract on the ground of fraud is bound to move promptly.—*Wright v. Peet*, 213.
8. A party who executes a deed for the illegal purpose of delaying his creditor in the collection of his debt, must bear the consequences if the party he trusts in his unlawful attempt defrauds him. Courts will not occupy themselves with adjusting equities between wrong doers.—*Gage v. Gage*, 229.

See ATTORNEYS, 1-7: BANKS, 3: CONTRACTS, 13, 14: EQUITY JURISPRUDENCE, 2, 3: EVIDENCE, 7, 8: SETTLEMENT, 1, 2: SPECIFIC PERFORMANCE, 1.

FRAUDULENT CONVERSION.

1. Under the statute (*1 Laws of 1875, p. 195*), making one to whom money, goods, or other property the subject of larceny shall have been delivered, and who shall embezzle or fraudu-

lently convert the same to his own use, etc., guilty of larceny, it is a sufficient delivery of trunks and baggage, where the checks for the same are delivered to respondent and he, acting under the authority which the delivery of such checks gave him, has assumed the right to and has exercised acts of possession and control over the trunks and baggage.—*People v. Husband*, 306.

2. The fact that a hotel keeper to whom checks for baggage have been delivered by a guest, would have a lien upon the baggage for the bill of such guest, would give him no authority to dispose of the property as his own, and would not justify his conversion of the same to his own use, or of itself preclude his being held under said statute, on the ground that he was a bailee with a special property in the goods.—*Ibid.*
3. And instructions to the jury that in case they found defendant claimed to have a lien upon the goods, and thought he had a right to pledge the goods by virtue of having such lien, then such claim of right, if made in good faith, would negative an intent to deprive the owner of her goods, are as favorable in this regard to the respondent as he is entitled to demand.—*Ibid.*

FURTHER PROOF.

See EQUITY PLEADING AND PRACTICE, 2.

FUTURE ACQUISITIONS.

See CHATTEL MORTGAGES, 1, 2.

FUTURE MERCANTILE ENGAGEMENTS.

See SURETIES, 1.

FUTURE PAYMENT.

See SALES, 4.

FUTURE WAGES.

See ASSIGNMENT, 4-6.

GARNISHEE PROCEEDINGS.

The query is suggested, whether under the garnishee laws it was the intention to permit the creditor to reach demands to which the debtor had no equitable right, though retaining the legal title.—*Kane v. Clough*, 436.

GENERAL AUTHORITY.

See CORPORATIONS, 1, 2.

GENERAL ISSUE.

See TRESPASS TO LANDS, 1-3.

GENERAL PROPOSALS.

See EVIDENCE, 4, 5.

GENERAL VERDICT.

See TRESPASS TO LANDS, 4.

GIFTS.

See INFANTS, 2, 3.

GIVING TIME TO REDEEM.

See FORECLOSURES, 23.

GOOD FAITH.

See FORECLOSURES, 22: FRAUDULENT CONVERSION, 3: PROMISSORY NOTES, 7, 8.

GOODS SUBSEQUENTLY PURCHASED.

See CHATTEL MORTGAGES, 1, 2.

GROWING CROPS.

1. The purchaser at a foreclosure sale in chancery becomes the owner of the crops then growing upon the premises.—*Scriven v. Moots*, 64.
2. The mortgagor cannot sustain any claim to wheat growing on the lands at the time of a foreclosure sale in chancery, on a disputed showing that the purchaser at such sale before held the legal title to the lands and was under a parol agreement to make certain advances and hold the land as security, where it is not claimed he was under any obligation to remove the incumbrances under which the foreclosure decree and sale was made; granting that the rights of such purchaser were before the sale no more than those of a mortgagee, he was not precluded thereby from purchasing at such sale and acquiring all the rights that any other purchaser would; and that sale cut off all previous equities of the mortgagor.—*Ibid*.
3. The giving of a bond by the mortgagor, under the requirement of an order of the court, as a condition to the granting of an injunction against proceedings by such purchaser to get possession under his foreclosure title, conditioned to prose-

cute his bill to redeem to final decree, and if the decree should be adverse, to pay a fair rental value for the premises, and to pay all taxes and all legal costs, and not to commit waste, could not operate, in the absence of any showing of an acceptance of the bond by the obligee or of any action taken or claim made under it, to deprive him of any of his substantial rights as purchaser in the premises or the crops growing thereon.—*Ibid.*
See SALES, 4.

GUARANTY.

1. A guaranty of payment of notes of third persons, to be paid out of the proceeds of a stock of goods belonging to the makers of the notes and on which the guarantor had a mortgage, the stock of goods then being held on a writ of replevin by an outside party, and the guaranty being conditioned to become operative only in the event of the guarantor getting possession of the goods under his mortgage, is held not effectual to make the guarantor liable in case of his failure to get possession of the goods, notwithstanding out of the litigation for possession of the goods he received some portion of the proceeds of the goods, but less than enough to satisfy his mortgage.—*Lieberman v. Barman*, 380.
2. The condition in the guaranty, that it should become operative only in the event of the guarantor getting possession of the goods on his mortgage, would not be answered by the guarantor's merely getting payment of his mortgage debt; the natural and obvious sense of the words of the condition import something more than this, and there is nothing to warrant a departure from that sense in construing the guaranty.—*Ibid.*

GUARDIANS' SALES.

1. A petition by a guardian for leave to sell real estate of his wards, which represents that the whole property of the wards consists of their interest in the two parcels of land, that over one hundred dollars is due and owing towards one parcel, that the other is burdened by a mortgage of fifty dollars, that the income of the property is inadequate to pay the debts, interest and taxes, and to maintain, support, and educate the wards, is held sufficient under the statute to give the probate court jurisdiction to grant a license to sell.—*Lynch v. Kirby*, 238.
2. The fact that some of the statements in such petition were untrue, could have no bearing upon the question whether the allegations of the petition were sufficient to give jurisdiction.—*Ibid.*

3. Where a guardian, after receiving license to sell, making sale and reporting it to the court, and after the court has confirmed the sale and ordered conveyance, dies, and his successor is appointed and qualifies, the latter may properly be directed and required to complete the transaction by deeding and receiving the purchase price. The act of conveyance is rather official than personal, and more a function of the place than a matter appropriated to any individual.—*Ibid.*
4. The oath required in connection with the sale would be inappropriate in such a case on the part of the new guardian.—*Ibid.*
5. Where a guardian's sale is made subject to a mortgage, and the mortgage is owned by the purchaser at such sale, there is no occasion to exact a bond from him to discharge it, since the effect of the transaction is to cancel the mortgage in his hands.—*Ibid.*
6. The record of the appointment of a guardian showing that the appointment was by consent of the ward, this record, when introduced in evidence in another cause, is not open to contradiction by parol.—*Ibid.*
See CHARGE TO THE JURY, 1.

GUESTS.

See FRAUDULENT CONVERSION, 1-3.

HEARSAY.

See PRACTICE IN SUPREME COURT, 11.

HEIRS.

See EVIDENCE, 9, 10.

HIGHWAYS.

See PLATS, 1.

HOMESTEAD.

1. Provisions exempting a homestead from execution are to be liberally construed, especially where the exemption is restricted within limits so very moderate as those which are prescribed in this state; and an intention to modify this right to the prejudice of the debtor, by a statute having other purposes for its object, is not lightly to be inferred.—*Barber v. Rorabeck*, 399.
2. An extension of village limits so as to include a farm occupied as a homestead and within the constitutional exemption as to size and value, will not operate to reduce or diminish

the right of exemption to the equivalent of a town lot according to the recorded plat, where the property is still occupied as a homestead and cultivated as a farm.—*Ibid.*

HOTEL KEEPER.

See FRAUDULENT CONVERSION, 1-3.

HOUSEWORK.

See EVIDENCE, 12.

HUSBAND AND WIFE.

1. An ordinary quit-claim deed from husband to wife, executed and delivered prior to the married woman's act, is of no more validity as an actual conveyance in equity than at law; and a deed absolutely void in law when made, is not validated as a conveyance by the subsequent laws enabling married women to take and enjoy property as if sole.—*Loomis v. Brush*, 40.
2. Such a deed on its face is not only legally void, but is presumptively voluntary.—*Ibid.*
3. While courts will, under peculiar circumstances, carry out a purpose which has failed by reason of the incapacity of the wife to accept a deed from her husband, the case must be plain and the equity manifest; and an equity, too, springing from a clear right arising out of matters independent of the deed.—*Ibid.*
4. Such a deed being void, its record would not be notice to any one of any possible equities between the parties to it; to make such a record constructive notice of such equities, would be to make the recording of a void instrument more extensive in its operation than that of a valid one, which is only notice of what its terms show.—*Ibid.*

See CONTRACTS, 8-16: DELIVERY: DOWER: LINE FENCES, 2: MARRIED WOMEN, 1, 2: MORTGAGES, 14: PARTNERSHIP, 2.

HYPOTHESIS.

See CHARGE TO THE JURY, 2, 3: RAPE, 4.

IDENTIFICATION.

See FORECLOSURES, 7: MORTGAGES, 1, 2.

ILLEGAL CONSIDERATION.

See CONTRACTS, 8-16: PROHIBITORY LIQUOR LAW, 1-3: PROMISSORY NOTES, 4.

ILLEGAL DISBURSEMENTS.

See SCHOOL DISTRICTS, 6.

ILLEGALITY.

See FINDING OF FACTS, 7: FORECLOSURES, 23.

ILLEGAL PURPOSE.

See FRAUD, 8.

ILLEGAL TAXES.

See TAXATION, 14, 15.

IMMATERIAL MATTERS.

See AGENCY, 2: ATTORNEYS, 6, 7: SPECIAL QUESTIONS TO THE JURY, 1.

IMPLICATIONS.

See TAXATION, 13.

IMPLIED AUTHORITY.

See MUNICIPAL CORPORATIONS, 3.

IMPLIED CONTRACTS.

See STREET PAVING, 2.

IMPLIED MEANING.

See PRACTICE IN SUPREME COURT, 6, 7.

IMPLIED PROMISE.

Where one who has wrongfully procured a school district order, has afterwards used it as money, the law raises an implied promise to pay the amount, and the tort may be waived and assumpsit brought.—*Bowen v. School District, etc.*, 149.

See COUNTY CLERK, 2.

INCONSISTENT ACTION.

See SPECIFIC PERFORMANCE, 3.

INCONSISTENT DEEDS.

See FORECLOSURES, 29.

INCORPOREAL INTEREST.

See LEASES, 5.

INCORRECT DESCRIPTION,

See FORECLOSURES, 1: MORTGAGES, 1, 2.

INDEBTEDNESS TO THIRD PERSON.

See MONEY HAD AND RECEIVED, 2, 3.

INDEFINITE EMPLOYMENT.

See STATUTE OF LIMITATIONS, 1.

INDEFINITE INTEREST.

See LEASES, 5-7.

INDEFINITE TIME.

See CONTRACTS, 7.

INDIVIDUAL INTEREST.

See ATTACHMENT, 3-6.

INDIVISIBLE CAUSE OF ACTION.

See SETTLEMENT, 1.

INDIVISIBLE INTEREST.

See LEASES, 7.

INFANTS.

1. An infant cannot empower an agent or attorney to act for him; and he therefore cannot affirm what another has assumed to do in his name as an agent or attorney. He cannot affirm what he could not authorize. The protection of infancy is a substantial one, and is not to be put aside and overcome by indirect methods.—*Armitage v. Widow*, 124.
2. There can be no presumption that a gift to an infant of a contract for the purchase of land at the price of thirteen thousand dollars, and upon which only four hundred dollars has been paid, is for the benefit of the infant; and even if he were an adult, acceptance could not be presumed, of a contract binding him to the payment of a large sum of money, in the absence of express evidence to establish it.—*Ibid.*

3. The gift by a father to his minor son, of a contract for the purchase of land, which he had before made in the son's name without his knowledge, will not entitle the son to recover back from the vendor the payment which the father had before made on the contract. The right to repudiate a contract is not the subject of gift.—*Ibid.*
4. An infant has no right during his minority to disaffirm a voidable contract of purchase.—*Ibid.*
See CONTRACTS, 1, 2.

INFERENCES.

See FINDING OF FACTS, 5: PARTNERSHIP, 4.

INFORMAL ACTION.

See TAXATION, 3.

INJUNCTION.

See CONTRACTS, 4-6: EQUITY JURISPRUDENCE, 7: EVIDENCE, 19: MUNICIPAL CORPORATIONS, 8: SPECIFIC PERFORMANCE, 1: TAXATION, 9.

INJURED SPOUSE.

See CONTRACTS, 11, 12, 16.

INQUIRIES.

See EVIDENCE, 9, 10.

INQUIRY.

See PROMISSORY NOTES, 1-3.

INSPECTION.

See SALES, 1-3.

INSTALLMENTS.

Accruing before decree: See FORECLOSURES, 15.

INSURANCE.

1. The exclusion of a question put to an agent residing in a different part of the county, requiring him to state as far as he knew what the usual custom was in the county as to insurance agents taking risks on all kinds of property, is not error, where the witness has before stated distinctly what his own practice was and that he knew nothing of the

practice at other agencies and that the same companies did not give like powers to all agents. The existence of such a practice at one place could not be inferred from such evidence of its existence at another.—*Reynolds v. Continental Ins. Co.*, 131.

2. Where an agent's written commission expressly excludes authority to insure manufactories and other special hazards, the mere circumstance that he acts as the company's local insurance agent, is not tantamount to a declaration by the company that he has authority to insure every kind of property and to exercise unlimited authority as to risks, modes and terms. By itself, it could imply nothing more than authority to insure in the mode required by the company's charter and to take such risks as the policies of the company in common use by its agents would warrant.—*Ibid.*
3. It is competent for an insurance company to waive strict compliance with the terms of its policies as to furnishing proofs of loss; and where it does waive such proofs, either expressly or by a course of conduct calculated to throw the insured off his guard, as by a distinct refusal to pay the loss, based upon some other defense, so that proofs are not furnished within the time fixed in the policy, it cannot afterwards take advantage of the delay and set it up as a defense to an action upon the policy.—*Aurora Fire & Marine Ins. Co. v. Kranich*, 289.
4. The query is suggested, whether where the policy required proofs of loss to be furnished within a specified time but did not declare the effect of a failure to furnish the same as required, while for a violation of other provisions of the policy it is expressly provided that the company shall be absolved from all liability, the failure to furnish proofs within the time fixed would in any case deprive the insured of all rights.—*Ibid.*
5. The provisions in a policy that "if at any time during the continuance of this policy * * * the insured property * * * shall become vacant or unoccupied" the insurer shall be absolved from all liability, is held to have no application to the case of buildings that are vacant at the time the policy is issued, the insurer having notice of the fact.—*Ibid.*
6. Under a policy containing such a provision, if the property is unoccupied when the risk is taken, with the knowledge of the insurer, but is afterwards occupied for a time, the insurer is liable, though the property at the time of the loss had again become vacant and unoccupied, in the absence of any provision in the policy requiring the insured to have and keep the property occupied. The risk is in no way

increased from what it was when the policy issued; and the policy failing to make provision for such a state of facts, the law will not step in and relieve the insurer from such responsibility.—*Ibid.*

7. Renewals, though amounting to a new contract, in no way change the terms and conditions of the original policy except as they continue it in force, but the rights of the parties are governed by the provisions of the policy as originally issued, except as the same are affected by any waiver that may have arisen in the meantime.—*Ibid.*
8. While a knowledge of facts brought home to the company at the time the policy is extended by renewal, may operate as a waiver of some of the provisions of the policy, it cannot operate to incorporate new provisions into the contract.—*Ibid.*
9. If the agent who issued the policy, or who renewed the same, had knowledge that the property was at the time unoccupied, the company cannot defend under a clause providing that if at any time during the continuance of the policy the property should become vacant or unoccupied the company should be absolved from all liability; the issue or renewal of the policy with such knowledge would be a waiver of this provision.—*Ibid.*
10. So far as an insurance agent acts as an insurance broker, he is agent for the insured and not the insurer.—*Hartford Fire Ins. Co. v. Reynolds*, 502.
11. Where the same person is at once agent for the insurance company and for the policy-holder, the latter is bound by notice to the agent of the cancellation of his policy, and by the return or credit of the premium to the agent.—*Ibid.*
12. An agent of an insurance company cannot revive a cancelled policy already rejected by the company, unless he has their authority to rescind or revoke their action, and that, too, in the specific case; this authority cannot be presumed.—*Ibid.*
13. An insurance agent having agreed with A to look after his risks in the company which he represented and in various others, reported lists to him showing the amount of his insurances therein, and gave him a receipt for money advanced to pay premiums:—

Held, In an action by A against the company represented by the agent, that as these papers were merely drawn up for A's information, by a person acting therein as his agent, and not in the course of any agency for the company, they were inadmissible to show any recognition by the company of the policy on which suit was brought.—*Ibid.*

See AGENCY, 1, 2: EVIDENCE, 5: MORTGAGES, 9, 10: PROMISSORY NOTES, 4.

INTENT.

See FRAUDULENT CONVERSION, 3: LEASES, 2: WILLS, 4.

INTEREST.

See EQUITY JURISPRUDENCE, 9: FORECLOSURES, 6: MORTGAGES, 4, 6, 8: PRACTICE IN SUPREME COURT, 8.

INTEREST CLAUSE.

See MORTGAGES, 8.

INTERESTED PARTY.

See DISSOLUTION OF ATTACHMENT, 1-3: FORECLOSURES, 10.

INTERMEDIATE GRANT.

See MORTGAGES, 3.

INTERPRETATION.

See LEASES, 2-7.

INTERVENING RIGHTS.

See AMENDMENTS, 3: WAIVER, 2.

INTOXICATING LIQUORS.

See FINDING OF FACTS, 6-8: PROMISSORY NOTES, 1-3.

INVOLUNTARY TRESPASS.

See TRESPASS TO LANDS, 1-4.

IRREGULAR FORECLOSURES.

See EQUITY JURISPRUDENCE, 9.

IRREGULARITIES.

See DEEDS.

IRREGULAR SERVICE.

See CONTRACTS, 5, 6.

IRRELEVANT SUBJECTS.

See REQUESTS TO CHARGE, 4.

JOINER.

Of counts: See DECLARATION, 6.

See EQUITY JURISPRUDENCE, 2.

JOINT ACTION.

See ATTACHMENT, 5, 6.

JOINT LIABILITY.

See RECEIPTS, 1: SCHOOL DISTRICTS, 10.

JOINT MAKERS.

See PROMISSORY NOTES, 9.

JOINT PARTIES.

See JUSTICE'S COURTS, 2.

JOINT PLAINTIFFS.

See EJECTMENT, 2.

JOINT TITLE.

See EJECTMENT, 2.

JUDGMENT.

Not supported by evidence: See PRACTICE IN SUPREME COURT, 1.
See AMENDMENTS, 2: ASSIGNMENT, 2, 3: EVIDENCE, 3: EXECUTIONS, 1, 2: FINDING OF FACTS, 7: JUSTICE'S COURTS, 1: LINE FENCES, 1, 2: MANDAMUS, 2: PLEA IN ABATEMENT, 1: TAXATION, 11: TOWNSHIP DRAIN COMMISSIONER, 4: TOWNSHIPS, 1: TRESPASS TO LANDS, 4: VENDOR'S LIEN, 1, 2.

JUDICIAL NOTICE.

See DECLARATION, 5: EVIDENCE, 6.

JUDICIAL POWER.

See SUPERIOR COURT OF GRAND RAPIDS, 3, 4.

JURISDICTION.

See AMENDMENTS, 2, 5-7: EMINENT DOMAIN, 1: EQUITY JURISPRUDENCE, 6: EXECUTIONS, 1, 2: GUARDIAN SALES, 1, 2: PLEA IN ABATEMENT, 1, 2: SUPERIOR COURT OF GRAND RAPIDS, 3, 4: TOWNSHIP DRAIN COMMISSIONER, 2-4.

JURISDICTIONAL DEFECTS.

See EVIDENCE, 3.

JURORS' FEES.

See SUPERIOR COURT OF GRAND RAPIDS, 1, 2.

JURY.

See PRACTICE IN CIRCUIT COURTS, 1.

JURY ROOM.

See PRACTICE IN CIRCUIT COURTS, 3, 4.

JURY TRIALS.

See EQUITY JURISPRUDENCE, 5.

JUSTICE'S COURTS.

1. When a justice of the peace has once rendered judgment in a cause he has no power to vacate the same, or set it aside, or to render a new judgment; and if he attempt this, though it be done in obedience to a writ of *mandamus* from the circuit court, the new judgment so attempted to be rendered will be a mere nullity, and the prior judgment will remain in full force.—*O'Brien v. Tallman*, 13.
2. It is competent for one of several plaintiffs or defendants to carry a case heard before a justice of the peace to the circuit court on appeal, and the refusal of his co-parties to unite with him in an appeal cannot preclude him from taking it on his own behalf.—*Keal v. Judge of Wayne Circuit*, 331.
See MANDAMUS, 2.

KENT COUNTY.

See SUPERIOR COURT OF GRAND RAPIDS, 1, 2.

LACHES.

See AMENDMENTS, 4: CONTRACTS, 14: EQUITY JURISPRUDENCE, 1: FRAUD, 7.

LACK OF EVIDENCE.

See PRACTICE IN SUPREME COURT, 3.

LAND CONTRACTS.

1. Where a party under contract to sell lands to one, conveys the same without his consent to another, the original vendee is clearly entitled to regard his contract as rescinded by his vendor, and is entitled to have restored what he had paid upon the contract, subject to such deductions as equity should require.—*Atkinson v. Scott*, 18.
2. In an action by the vendee in a land contract against his vendor, to recover back the purchase money paid, the vendor

having conveyed the premises to a third person, where there is a conflict of evidence as to whether this conveyance was by the consent of such vendee, it is error for the court to take the question away from the jury and to direct them to find for the defendant.—*Ibid.*

See INFANTS, 2, 3: SPECIFIC PERFORMANCE, 1-4.

LANDLORD AND TENANT.

See LEASES, 1-7.

LAPSE OF TIME.

See CERTIFICATES OF DEPOSIT, 2: TOWNSHIP DRAIN COMMISSIONER, 2-4.

LARCENY.

See FRAUDULENT CONVERSION, 1-3.

LEASES.

1. A lessee of lands for years is entitled to work an open mine upon the premises, unless restricted by the terms of his lease: but he has no right to open a new mine, unless this privilege be expressly granted.—*Harlow v. Lake Superior Iron Co.*, 105.
2. In construing a written lease, it is contrary to well settled rules of construction to give it a narrow and technical interpretation based upon some particular word or clause; the intent must be gathered from an examination of the instrument as a whole, and such a construction must be put upon it, if possible, as will render all its clauses consistent and harmonious.—*Ibid.*
3. The lease in question in this cause is construed to be, not a lease of the lands, with the privilege of mining thereon, or together with the ore and minerals to be found upon the same, but a grant of a specific mining privilege, particularly set forth in the lease, in such manner as to exclude all other uses to which the lessee might otherwise have been entitled to put the premises; and to confer no right to the use or possession of the lands for any purpose whatever except as an incident to the mining right granted and in connection with the exercise of that right.—*Ibid.*
4. The provision in the lease, reserving to the lessor the use for agricultural purposes of all the premises not needed for mining purposes, is inconsistent with an intent to grant an ordinary leasehold interest.—*Ibid.*
5. Under a lease granting an undivided interest or right to enter upon the premises and open and work such mines as

the lessee might deem proper, with the further right to appropriate to his sole use and benefit all ores and minerals procured by him, and the right to obtain wood for the purposes aforesaid, to erect and maintain buildings suitable and needful for the business, the right of the lessee in the premises, until actual possession of some part thereof has been taken, is floating and indefinite, a mere incorporeal right, which is not capable of enforcement by an action of ejectment.—*Ibid.*

6. The provisions in the lease whereby the lessor agrees not to sell, assign or encumber the undivided interest leased without giving the lessee or his assigns the first refusal to purchase the same, and in case of division to give the lessee, his heirs or assigns, the first refusal to purchase the divided half, and gives the lessee the right to have the land divided, are held not inconsistent with the construction put upon the lease by the court.—*Ibid.*
7. The right leased, being that of an undivided half, gave the lessee the right to prospect over the entire lands and open and work as many mines as he deemed proper; and this right he could undoubtedly assign or convey to a copartnership or corporation; but he could not carve it up and parcel it out into several distinct rights, to be held and operated by more than one person, company or corporation; his right, being a single one, could not be subdivided; and a similar undivided right remained vested in the lessor.—*Ibid.*

LEAVE OF COURT.

See FORECLOSURES, 12.

LEAVE TO TAKE FURTHER PROOFS.

See EQUITY PLEADING AND PRACTICE, 2.

LEGAL CONTROL.

See DELIVERY.

LEGAL RIGHTS.

See MANDAMUS, 3-5, 7.

LEGISLATIVE AUTHORITY.

1. It is a sound rule of policy, no less than of courtesy, that a court shall abstain from questioning the validity of legislation until it becomes absolutely necessary in the decision of a pending controversy.—*Upton v. Kennedy*, 215.
2. The return of the township collector having been shown in this case to have been a mere nullity, the question argued

by counsel, of the constitutional power in the legislature to make a tax deed conclusive evidence of title, where it appears to have been given on a sale of lands for taxes, some of which were valid and had never been paid or in any manner discharged, is not necessarily involved, and is therefore not considered.—*Ibid.*

See REPRESENTATIVE DISTRICTS, 1-3: SUPERIOR COURT OF GRAND RAPIDS, 2-4.

LEVY.

See ATTACHMENT, 3-11: EQUITY JURISPRUDENCE, 8.

LIABILITY OF NEW DISTRICTS.

See SCHOOL DISTRICTS, 10.

LIBRARIES.

See FINES, 2: WILLS, 1-5.

LICENSE TO SELL.

See GUARDIAN SALES, 1, 2.

LIENS.

See FRAUDULENT CONVERSION, 2, 3: VENDOR'S LIEN, 1, 2: WAIVER, 1, 2.

LIFE.

See EVIDENCE, 9, 10.

LIMITS.

See MUNICIPAL CORPORATION, 1-8.

LINE FENCES.

1. It is incumbent upon a party attempting to enforce the penal liability allowed by the statute (*Comp. L. 1871, §§ 778-9*) as to building line fences between adjoining proprietors, to show that in substance all the conditions have arisen which the statute contemplates as precedent to it; and where judgment is given on a special finding, the finding must show the existence of the requisite conditions; and one of the conditions to the liability to pay double the cost of building such line fence is, that the fence viewers in writing under their hands assigned a reasonable time for the party charged as delinquent to make the fence.—*Carpenter v. Vail*, 226.

2. An occupant of premises, to be held liable under the statute for the building of line fences, must be one in possession and having the use and control of the premises in such manner that he has a lawful right, if he so wills, to fence voluntarily; and one who merely lodges with his wife on premises belonging to the wife and of which she is the exclusive manager, and who carries on business by himself elsewhere, and has no more legal right to fence or to interfere with the matter than a stranger, cannot be made liable for line fences built by an adjoining proprietor.—*Ibid.*

LIQUORS.

See FINDING OF FACTS, 6, 8: PROHIBITORY LIQUOR LAW, 1-3.

LOANS TO INSOLVENT PERSONS.

See BANKS, 1-5.

LOCAL AGENT.

See INSURANCE, 2.

LOCATING DRAINS.

See TOWNSHIP DRAIN COMMISSIONER, 3.

LOGS.

See WAIVER, 1, 2.

LOSS.

See EVIDENCE, 2.

LOST LETTERS.

See EVIDENCE, 2.

LOTS AND BLOCKS.

See EVIDENCE, 6.

LOWEST BIDDER.

See STREET PAVING, 1.

LUMBER.

See MORTGAGES, 7: SALES, 1-3.

MANAGERS.

See WILLS, 2, 4.

MANDAMUS.

1. Assumpsit will not lie against a city upon city orders, where the charter provides that no money shall be drawn from the city treasury unless it shall have been previously appropriated to the purpose for which it shall be drawn, and requires all orders to specify the object and purposes of such payment; the remedy for the improper refusal of payment upon orders properly drawn is by *mandamus*.—*Peterson v. Manistee*, 8.
2. While *mandamus* may issue to compel a justice, if he refuses, to proceed and enter up a judgment in a case proper for a judgment to be rendered, it will not lie to compel him to vacate or change a judgment he has already rendered, and which is subject to be reviewed by *certiorari* or on appeal. *Mandamus* will never lie to review irregularities in the judicial action of an inferior tribunal where the party injured has another adequate remedy.—*O'Brien v. Tallman*, 13.
3. *Mandamus* lies only to enforce strict legal rights, and will not be granted to enforce the doing of an act which by law lies in the discretion of the officer refusing to do it.—*Houghton County v. Auditor General*, 271.
4. The statute (*Comp. L. 1871, § 1034*) requiring all returns by the county treasurers of lands on which the taxes are delinquent, to be delivered into the auditor general's office on or before the last day of March in the year following their assessment, and the auditor general being required by another section of the statute (§ 1044) to make out the lists for publication on the first day of July, *mandamus* will not be granted to compel that officer to receive and accept such returns which are forwarded after the first day of July and upon the basis thereof to credit the county with the amount of delinquent taxes so returned.—*Ibid.*
5. Whether or not the auditor general might in his discretion receive and accept returns forwarded to him at such a late day, it is clear there is nothing in the statutes making it his duty so to do, or conferring upon the county the legal right to demand credit upon its account with the state for the amount of such belated returns.—*Ibid.*
6. Upon an application for *mandamus* to require a circuit judge to grant a motion made upon a showing of facts before him and which upon the showing he denied, the case must be heard on the facts disclosed on the hearing of the motion in the circuit, and not on new facts first brought into the case on this application.—*McCarthy v. Judge of Monroe Circuit*, 274.
7. Where on an application for *mandamus* complaint is made of the action of the circuit judge in refusing to grant relators' motion for a resale upon execution, the proceeding being a

- proper one to be considered upon evidence and to be determined according to the requirements of the facts established, unless the case made on the motion before the circuit judge was such as to give relators a plain legal right to the order of resale, *mandamus* will not be awarded.—*Ibid.*
8. And where the record on the application for *mandamus* does not disclose what the showing was on the motion in the circuit, the court cannot say relators were entitled to any different order on their motion than that which was made, and will not grant *mandamus* to compel the circuit judge to reverse his action.—*Ibid.*
 9. *Mandamus* will not issue to enforce any doubtful right.—*Pack v. Supervisors of Presque Isle County*, 377.
 10. Under the statute (*Comp. L. 1871*, § 477) it requires a popular vote to authorize the borrowing or raising by tax for building purposes in any one year by a county, of a sum exceeding one thousand dollars; and *mandamus* is refused to compel provision to be made by taxation to pay warrants amounting to twenty-six hundred and forty dollars, purporting to have been issued by a board of supervisors for county building purposes between June, 1874, and January, 1875, where the question of raising or borrowing this money has never been submitted to a vote of the people, the relator having notice of the invalidity of the warrants.—*Ibid.*
 11. On this application for *mandamus* to compel the raising a tax to pay warrants purporting to be issued by a board of supervisors, the question of the validity of the proceedings to organize the county, not being essential to the decision of the case, is not determined.—*Ibid.*
 12. On an application for *mandamus* to require the county treasurer to pay an order drawn by persons claiming to be superintendents of the poor, the legal title of the officers will not be tried; but it appearing on the record that their appointment was unauthorized, *mandamus* will not be granted unless it appears that notwithstanding the want of title, they have got actual possession and are generally reputed to be such officers, and are hence officers *de facto*.—*Mead v. Treasurer of Ingham County*, 416.
 13. In *mandamus* cases where the matter is heard on petition and answer, the answer is to be taken as true; and the statement in the answer in this case that the superintendents sought to be illegally removed have retained the files and records of their offices, have constantly denied the right to make the removal, and have continued to act as officers, is conclusive against the claim of the new appointees that they have acted as such officers with general acquiescence in their right.—*Ibid.*
 14. *Mandamus* will not lie to review the refusal of a probate

court to grant letters of administration on an estate of a decedent.—*Campau v. Probate Judge of St. Joseph County*, 500.
See ESTATES OF DECEASED PERSONS, 1: JUSTICE'S COURTS, 1:
SCHOOL DISTRICTS, 1-6.

MANUFACTORIES.

See INSURANCE, 2.

MANUFACTURING LUMBER.

See MORTGAGES, 7.

MAPS.

See EVIDENCE, 6.

MARRIED WOMEN.

1. A debt for property purchased is a valid liability in this state against a married woman.—*Gillam v. Boynton*, 236.
2. The findings of fact in this case showing that defendant was engaged in business for herself, that her husband had bought a safe on credit and had not paid for it and offered to return it to the vendors, with a proposition that his wife would, if they chose to sell it to her, give her note for an amount and at a time specified, which was the note in suit, that the vendors accepted this proposition and the note was sent accordingly, and that the husband acted in the matter only as agent for his wife and with her authority, and it being further found, though nominally as findings of law, that the vendors owned the safe and sold it to defendant in her own right and on her sole credit, and accepted this note in payment, the objection that the facts found do not support the judgment for plaintiffs, is held not well taken.—*Ibid.*
See CONTRACTS, 8-16: DELIVERY: DOWER: HUSBAND AND WIFE, 1-4: LINE FENCES, 2.

MATERIALS.

See STREET PAVING, 5.

MATTERS EQUALLY KNOWN TO DECEDENT.

See EVIDENCE, 13, 14: FORECLOSURES, 19, 20.

MEASUREMENT.

See SALES, 1-3.

MERE POSSIBILITY.

See ASSIGNMENTS, 4-6.

36 MICH.—75.

MILL TAX.

See TAXATION, 11.

MINES.

See LEASES, 1-7.

MINING PRIVILEGE.

See LEASES, 3-7.

MINORS.

See CONTRACTS, 1, 2: EVIDENCE, 17, 18: INFANTS, 1-4: REQUESTS TO CHARGE, 1.

MISJOINDER.

See DECLARATIONS, 6.

MISTAKE.

The evidence of mistake in a written contract, on which the court should act in giving relief, ought to be so clear as to establish the fact beyond cavil; and especially when the party setting up the mistake has had the contract prepared by his own professional adviser, and apparently with care and deliberation.—*Vary v. Shea*, 388.

See FORECLOSURES, 22: MORTGAGES, 14, 15: SPECIFIC PERFORMANCE, 4.

MISUSE OF PROCESS.

See CONTRACTS, 8-16.

MITIGATION OF DAMAGES.

See TRESPASS TO LANDS, 3.

MODERATOR.

See SCHOOL DISTRICTS, 1-6.

MONEY HAD AND RECEIVED.

1. The action for money had and received is an equitable action and must be subject to equitable principles.—*Atkinson v. Scott*, 18.
2. In order to make defendants liable for money had and received to the use of creditors of their sub-contractor, on the ground of their mere failure to pay to their sub-contractor,

or on his account, a sum claimed to be his due, there must be a showing at least that there had been a settlement with him under which the sum so claimed had been allowed as so much money, and that defendants had agreed to pay it as their own obligation accordingly.—*Barden v. Briscoe*, 254.

3. On the theory of the plaintiffs' right to recover as money had and received to their use a sum they claimed defendants owed their own sub-contractor, who was plaintiffs' debtor, evidence that defendants had in fact overpaid such sub-contractor would be relevant; and plaintiffs cannot complain on the ground of irrelevancy of the admission of evidence which is relevant upon the only issue under which it would have been possible for them to recover upon their own view of the case.—*Ibid.*

See EQUITY JURISPRUDENCE, 4: LAND CONTRACTS, 1, 2.

MONEYS PAID FOR LIQUORS.

See SET-OFF.

MONEYS WRONGFULLY APPROPRIATED.

See EQUITY JURISPRUDENCE, 2-4.

MORTGAGEES.

See FORECLOSURES, 16: MORTGAGES.

MORTGAGES.

1. Omitting to name the state, county, and township, in the description of premises in a mortgage, will not invalidate the instrument, where other adequate elements of identification exist; and it is not essential that the property should be so described as to identify it without the aid of extrinsic proofs, but it is always competent to connect the written description with the material subject matter by proof of the surrounding circumstances.—*Slater v. Breese*, 77.
2. Where there are descriptive signs satisfactorily ascertained which designate the thing meant to be granted, the addition of circumstances or accompaniments which are untrue will not defeat the grant, but they will be rejected.—*Ibid.*
3. The statement in a deed from an intermediate holder of a portion of the premises covered by a mortgage, that the grant is subject to such mortgage, in the absence of any requirement that the grantee assume and pay the same, will not make the mortgage a specific charge upon the portion or interest granted by such deed, so as to influence the equities as between second and third mortgagees upon other portions of the mortgaged premises.—*Ibid.*

4. Upon the sale of certain saw-mill property and pine-lands, the purchaser having given for part of the purchase price his five promissory notes of eleven thousand dollars each, payable one in each year for five successive years, with interest payable semi-annually, secured by mortgage on the property, and the contract of purchase providing that the vendors should furnish to the purchaser, to be sawed at the mill, fifty-five million feet of saw-logs in quantities of eleven million feet per annum, and to pay him for sawing the same, and that one dollar per thousand feet of the saw-bill was to be retained by the vendors and applied each season in payment of the principal of the note then next maturing, it was held, that it was the evident intent of the parties, as expressed in their agreement, that the one dollar per thousand feet thus reserved from the saw-bill of each eleven million feet should be in full satisfaction of the note then next maturing, and that the note should not bear interest during that year, if paid in sawing in this manner; the payments for sawing beginning on May 1st, and continuing in monthly installments during the sawing season, which would close in October or early in November, and the notes not maturing till January, the average time of payment by means of the sawing would be nearly six months before the principal would become due according to the terms of the note.—*Wilcox v. Allen*, 160.
5. The contract of sale of the mill property and land, with the agreement to furnish the logs for sawing, and the notes and mortgage given for the purchase price, are all construed together as constituting but one transaction.—*Ibid*.
6. The contract between the parties being afterwards modified so as to give the vendors the option to furnish fifteen million feet of logs during the first season, instead of eleven million, with the option to the vendee of applying any portion of the saw-bill of the additional four million feet of logs in payment of the purchase-price notes, it is held this agreement gave the mortgagor the option of applying the saw-bill of any additional logs delivered under the agreement in payment of any of the notes, and was broad enough to authorize its being applied by him in payment of either principal or interest upon any or all of the notes.—*Ibid*.
7. The contract providing for the logs being scaled in the mill by a competent scaler whose appointment was provided for, and that the party doing the sawing was to deliver the same number of feet of merchantable lumber as would be equivalent, board measure, to the total scalage of the logs delivered, it is held that when he had complied with this provision he had delivered all he was bound to under the contract, and he was entitled to any excess.—*Ibid*.

8. Under an interest clause in a mortgage, providing that upon default for more than sixty days in the payment of interest after it comes due, the whole principal should, at the option of the mortgagees, become immediately due and payable, it is held that where the mortgagor in good faith and upon reasonable grounds denied his liability to pay interest, or claimed that he had paid it, he could not by virtue of this clause be made liable to pay the whole principal at once, even though it should turn out, upon trial of the matter, that he was in error. This clause is in the nature of a forfeiture or penalty, its object being to punish for the willful neglect of a clear duty, and to hold it applicable to a case where there was an honest dispute, would be harsh and unjust, and contrary to equity.—*Ibid.*
9. The mill having been insured and subsequently destroyed by fire, and the insurance transferred, according to agreement, to the mortgagees to be collected and applied as fast as collected in payment of the mortgage indebtedness, the insurance thus collected should be allowed as payment upon the mortgage.—*Ibid.*
10. The mortgagees having assigned the notes and mortgage to a trustee, in trust to pay certain indebtedness of theirs, under an arrangement that upon default upon their part the notes and mortgage were to be sold and from the proceeds their debt and interest paid and the balance if any turned over to the assignors, and the beneficiary under such trust having full knowledge of the provisions as to payment by sawing, and also of the agreement as to the insurance, and that the mortgagees were expected to collect the same, the assignee is held bound under the circumstances by the agreements and dealings in this regard between the mortgagor and the mortgagees.—*Ibid.*
11. One of the several notes secured by the mortgage having been turned out by the mortgagees as collateral to an indebtedness of theirs to a party whose equities might turn out to be different from theirs, it was competent for such assignee to file a cross-bill; and the fact that his interests would be fully protected as defendant in the original cause in case the complainants therein prevailed, would be no ground for holding the cross-bill improperly filed, where in case the original bill were dismissed, the complainant in the cross-bill would thereby be deprived of the means of obtaining the relief to which he might be entitled.—*Ibid.*
12. Where several notes of like date, but falling due at different times, are secured by one mortgage, it is error in a foreclosure decree to give priority to any of the notes.—*Ibid.*
13. Mortgagees having assigned as collateral to their indebtedness one of several notes secured by the mortgage, and hav-

- ing filed a bill to foreclose the mortgage, and their assignee having thereupon filed a cross-bill to protect his interests, it is competent on such cross-bill to render a decree holding said mortgagees personally liable to their assignee for any deficiency, though they have not made themselves liable upon the note as endorers or otherwise, they being liable to him upon the original indebtedness sought to be recovered.—*Ibid.*
14. A mortgagee who has received in good faith a mortgage executed by his debtor and his wife, of property the title to which of record was in the husband, is not liable to have his mortgage invalidated as to a portion of the premises, on a claim by the wife of the mortgagor that she held such portion by an unrecorded deed from her husband, and that the same was included in the mortgage by a mistake of her husband, for which mistake it is not claimed the mortgagee was in any wise responsible.—*Shepard v. Shepard*, 173.
 15. The law requires very strong proof to support a real charge of mistake in a deed, and it has never gone so far as to convict a mortgage of embracing lands which ought not to have been put in, although in a condition to be so mortgaged and deliberately included by the mortgagor himself, on the naked ground that the mortgagor swears he entertained a secret design to exclude such lands from the description.—*Ibid.*
 16. A mortgage in this state conveys no title to the mortgagee, but is a security merely for the debt; and the mortgagee before foreclosure has no legal interest in the mortgaged premises and is not entitled to possession.—*Wagar v. Stone*, 364.
 17. Complainants having filed their bill to foreclose a mortgage given to secure payment of four promissory notes made by third persons and which the mortgagors had delivered to complainants on the purchase of the mortgaged premises, the theory of the defense, that the notes were received in payment for the land and that the purchasers were not to be looked to for payment except upon the mortgage and according to its conditions, is held to be supported by the proofs.—*Metz v. Todd*, 473.
 18. The mortgagees in such mortgage having, for a consideration paid to them, and without the knowledge of the mortgagors, extended the time of payment to the maker of the only note remaining unpaid, the land thereby became discharged from the mortgage lien; the mortgagors, though not personally liable as sureties, yet as owners of the mortgaged land they occupied that position.—*Ibid.*

See CONTRACTS, 8, 19-21: EQUITY JURISPRUDENCE, 9: EVIDENCE, 7, 8: FORECLOSURES, 1-30: FRAUD, 3, 7: GROWING CROPS, 2: GUARDIAN SALES, 1, 5: PROMISSORY NOTES, 5: REPLEVIN, 1-3.

MORTGAGORS.

See GROWING CROPS, 2, 3.

MOTIONS.

See FORECLOSURES, 10, 11: MANDAMUS, 6-8.

MULTIPLICITY OF SUITS.

See EQUITY JURISPRUDENCE, 2.

MUNICIPAL CORPORATIONS.

1. The general doctrine is clear, that a municipal corporation cannot usually exercise its powers beyond its own limits; and if it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it.—*Coldwater v. Tucker*, 474.
2. The query is suggested, whether, even by contract, a city can build or possess public works beyond its limits, without plain permission of the legislature.—*Ibid*.
3. The authority of a city to provide sewerage beyond the city limits may be implied from the existence of a state of facts which renders it actually necessary or manifestly desirable, as where a city, though bounded by a stream, is required by its charter to preserve the stream from pollution and prevent the depositing of filth therein, and no other outlet is reasonably available except through means of ditches extending beyond the limits.—*Ibid*.
4. And where the drainage requires an outlet beyond the city limits, and the surroundings are such as to raise the implication of authority in the city to conduct the work beyond its limits, the city must be permitted to retain some discretion as to the arrangements by which it shall accomplish the purpose; and there is no legal obstacle to its undertaking to do this work by its own servants or contractors, instead of employing the owner of the premises to do it.—*Ibid*.
5. A city thus situated having led its sewer to the city limits, where it emptied into a county ditch, which was found to be inadequate, made a contract with the adjoining proprietor to enlarge and straighten the ditch through his premises, so as to provide for carrying off all the water without overflowing or saturating his land, agreeing to keep the ditch in repair, not to injure or obstruct the cross-ditches, and to maintain a good bridge across it on his premises:—

Held, That the work undertaken by the city could not be regarded as repugnant or foreign to the purposes of its charter, and that the contract was not beyond the corporate powers.—*Ibid*.

6. The undertaking by the city in such contract to make the ditch sufficient to carry off all water without overflowing or saturating the adjoining premises, cannot be construed to obligate the city to make provision for extraordinary and unexpected floods, or to put the proprietor in any better condition than he would have been with the ditch as it was before and with the extra city flowage excluded.—*Ibid.*
7. The contract having made provision for a settlement by arbitration for any mischief caused by neglect in repairs, this indicates a design that such neglect should not terminate the contract, unless the failure were so great as to amount to a practical abandonment of the contract obligation.—*Ibid.*
8. The city in making the improvement in the first instance having in good faith substantially complied with its obligation, and constructed a ditch apparently satisfactory at the time to the other party to the contract, and no serious fault or neglect being established against the city, injunction is granted to restrain the owner of the premises from filling in the ditch so as to obstruct the city flowage.—*Ibid.*
See STREET PAVING, 1-6.

MUNICIPAL COURTS.

See SUPERIOR COURT OF GRAND RAPIDS, 3, 4.

NAKED LEGAL TITLE.

See GARNISHEE PROCEEDINGS, 1.

NECESSITY.

See MUNICIPAL CORPORATIONS, 3: SCHOOL DISTRICTS, 8.

NE EXEAT BOND.

See CONTRACTS, 3.

NEGLECT TO REPAIR.

See MUNICIPAL CORPORATIONS, 7.

NEGOTIABLE PAPER.

See PROMISSORY NOTES, 5-8.

NEW APPOINTEES.

See SUPERINTENDENTS OF THE POOR, 1-4.

NEW CONSIDERATION.

See STATUTE OF FRAUDS, 5.

NEW CONTRACT.

See INSURANCE, 7, 8.

NEW DISTRICTS.

See SCHOOL DISTRICT, 10.

NEW ENUMERATION.

See REPRESENTATIVE DISTRICTS, 1, 2.

NEW FACTS.

See MANDAMUS, 6-8.

NEW FIRM.

See PARTNERSHIP, 1-3.

NEW GUARDIAN.

See GUARDIAN SALES, 3, 4.

NEW ISSUE.

See PLEA PUIS DARREIN CONTINUANCE, 1.

NEW JUDGMENT.

See JUSTICE'S COURTS, 1.

NEW MEMBER.

See PARTNERSHIP, 1-3.

NON DELIVERY.

See EQUITY PLEADING AND PRACTICE, 4.

NON JOINDER.

See RECEIPTORS, 1.

NOTES OF THIRD PERSONS.

See MORTGAGES, 17, 18.

NOTICE.

Of hearing: See EQUITY PLEADING AND PRACTICE, 1.

See AMENDMENTS, 1, 2, 6, 7: ASSIGNMENT, 3: BANKS, 3-5:

BONA FIDE PURCHASERS: CHARGE TO THE JURY, 4-6:

CHattel MORTGAGES, 2: EMINENT DOMAIN: EVIDENCE, 7, 8:

36 MICH.—75.

FORECLOSURES, 11: HUSBAND AND WIFE, 4: INSURANCE, 8, 9, 11: PARTNERSHIP, 2: PLEA PUIS DARREIN CONTINUANCE, 2: PROMISSORY NOTES, 1, 2: TRESPASS TO LANDS, 1-3.

NOVATION.

See PARTNERSHIP, 2.

NUNC PRO TUNC.

See EJECTMENT, 1.

OATH BEFORE SALE.

See GUARDIAN SALES, 4.

OBJECTIONS ABANDONED.

See PRACTICE IN SUPREME COURT, 2.

OBScurity.

See REQUESTS TO CHARGE, 3.

OCCUPANT.

See LINE FENCES, 2.

OFFER.

Of proof: See EVIDENCE, 4, 5: PRACTICE IN SUPREME COURT, 5-7.

To perform: See ATTACHMENT, 11.

To turn out the property: See RECEIPTORS, 2.

OFFICE.

See MANDAMUS, 12, 13: SUPERINTENDENTS OF THE POOR, 1-4.

OFFICERS.

De facto: See MANDAMUS, 12, 13: SUPERINTENDENTS OF THE POOR, 3, 4.

See AMENDMENTS, 7: BANKS, 1-5: CORPORATIONS, 1, 2: EQUITY JURISPRUDENCE, 2-4: GUARDIAN SALES, 3: MANDAMUS, 3-5: RECEIPTORS, 1-4: SCHOOL DISTRICTS, 1-6.

OFFICIAL REGULARITY.

See TAXATION, 1.

OPEN AND NOTORIOUS ADULTERY.

See DIVORCE, 1.

OPENING ARGUMENT.

See PRACTICE IN CIRCUIT COURTS, 2.

OPINION.

Of circuit judge: See ATTORNEYS, 4.

Of party: See BANKS, 1.

ORAL ORDERS.

See PROHIBITORY LIQUOR LAW, 1, 2.

ORDERS.

For liquors: See PROHIBITORY LIQUOR LAW, 1, 2.

Of sale: See FORECLOSURES, 3-6.

To hold to ball: See PRACTICE IN CIRCUIT COURTS, 5.

To show cause: See ATTORNEYS, 1, 2.

Used as money: See IMPLIED PROMISE.

See EVIDENCE, 16: MANDAMUS, 1: PAYMENT, 1.

ORIGINAL PROMISE.

See STATUTE OF FRAUDS, 3-6.

ORIGINALS.

See EVIDENCE, 1.

ORIGINAL UNDERTAKING.

See STATUTE OF FRAUDS, 1.

OUSTER.

See EVIDENCE, 11.

OUTSTANDING TITLES.

See FORECLOSURES, 19, 20.

OUTLET FOR SEWERS.

See MUNICIPAL CORPORATIONS, 1-8.

PARAMOUNT OUTSTANDING TITLES.

See FORECLOSURES, 19, 20.

PARCELING OUT TERRITORY.

See SCHOOL DISTRICTS, 10.

PARCELS.

See **FORECLOSURES**, 17, 24-31.

PAROL EVIDENCE.

See **EVIDENCE**, 3, 15: **GUARDIAN SALES**, 6.

PARTIAL AGREEMENTS.

See **SPECIFIC PERFORMANCE**, 2.

PARTICULAR USE.

See **LEASES**, 2-7.

PARTIES.

In interest: See **FORECLOSURES**, 10, 11.

See **JUSTICE'S COURTS**, 2.

PARTNER OF PLAINTIFF'S ATTORNEY.

See **DISSOLUTION OF ATTACHMENT**, 1, 2.

PARTNERSHIP.

1. Where the creditor of a firm, holding firm notes, sues a new firm, composed of two members of the original firm and a third person to whom the third member thereof has sold out his interest under an arrangement that the purchaser should assume his share of the partnership liabilities, basing her right of action on the assumption by the new firm of her debt against the old, and a promise to her to pay it, it is error to treat the case as one coming within the principle of cases where a plaintiff counts on a promise made to a third person.—*Osborn v. Osborn*, 48.
2. Whatever is done by one member of a partnership in the course of the business, is presumed to be known to the others; and this presumption applies just as strongly to the acts of a partner who is the husband of a creditor of the firm, in his dealings with his wife as such creditor, as to his dealings with any other creditor.—*Ibid.*
3. The new member having covenanted, as between himself and the retiring partner, to pay the latter's share of the partnership liabilities, and the new firm having made payments on the plaintiff's claim, and the retiring partner having assigned to plaintiff all claim he might have against such new member on the agreement between them, and the plaintiff having thereupon brought this suit against the new firm,

these facts, appearing in evidence, would be sufficient to fairly warrant a jury in finding that plaintiff had accepted the new firm as her debtor in place of the old, and had consented to the substitution which the several partners among themselves had agreed upon.—*Ibid.*

4. Where one owning lands makes an arrangement with another to cut and run the cedar posts on the lands at his own expense on shares, the latter receiving half the posts and paying all the cutting expenses, these expenses cannot be regarded as partnership expenses, nor is the business such as to authorize any necessary inference of partnership.—*St. Denis v. Saunders*, 369.

See ATTACHMENT, 3-6: FINDING OF FACTS, 4, 5: PRACTICE IN SUPREME COURT, 3.

PART PERFORMANCE.

See CONTRACTS, 9.

PAST DUE.

See CERTIFICATES OF DEPOSIT, 2: STATUTE OF LIMITATIONS, 2-4.

PATENTED IMPROVEMENT.

See CONTRACTS, 4-6: EVIDENCE, 19.

PAVING STREETS.

See STREET PAVING, 1-6.

PAYABLE.

After demand: See PROMISSORY NOTES, 10.

On demand: See CERTIFICATES OF DEPOSIT, 1-4.

On or before a specified date: See PROMISSORY NOTES, 6.

PAYMENT.

1. Proof of the payment by the defendant of orders drawn by the plaintiffs upon him in favor of third persons for liquors sold would be sufficient proof of payment to the plaintiffs; such payment is in law a payment to the plaintiffs themselves.—*Webber v. Howe*, 150.
 2. The taking of the debtor's acceptances does not operate as payment of the debt in the absence of an agreement that they should be received in payment.—*Au Sable River Boom Co. v. Sandorn*, 358.
- To adverse claimant: See FORECLOSURES, 19, 20.
See AGENCY, 4: CONTRACTS, 17: EVIDENCE, 18: FORECLOSURES, 19, 20: MORTGAGES, 4-10, 17: SALES, 4: SCHOOL DISTRICTS, 5, 6: TAXATION, 6: TOWNSHIPS, 2.

PENAL LAWS.

See FINES, 2.

PENALTIES.

See FINES, 2, 3: LINE FENCES, 1, 2.

PENDENCY OF ANOTHER SUIT.

See PLEA IN ABATEMENT, 3.

PERFORMANCE.

Of condition: See ATTACHMENT, 10, 11: DECLARATION, 3.
See CONTRACTS, 3: GUARANTY, 1.

PERMISSION.

To use patented improvement: See CONTRACTS, 4-6.

PERSONAL DECREE.

See FORECLOSURES, 13.

PERSONAL LIABILITY.

See MORTGAGES, 13.

PETITION.

For administration: See MANDAMUS, 14.
See GUARDIAN SALES, 1, 2.

PIECE WORK.

See ASSIGNMENT, 6.

PLACE.

See PROHIBITORY LIQUOR LAW, 1, 2: PROMISSORY NOTES, 4:
REMOVAL OF COUNTY SEAT.

PLAINTIFF'S ATTORNEY.

See DISSOLUTION OF ATTACHMENT, 1.

PLATS.

Under a statute requiring the acknowledgment of plats to be under the seal of the acknowledging officer (*Comp. L. 1871, § 1345*), a recorded copy of a plat, bearing the certificate of a notary which is not under seal, is insufficient to establish the plat, and to prove the existence of a highway by dedication

by the proprietors. Unauthorized records of plats are not made *prima facie* evidence of their execution and validity.—*Grand Rapids v. Hastings*, 122.
See EVIDENCE, 6.

PLEA.

See TRESPASS TO LANDS, 1-3.

PLEADINGS.

See EVIDENCE, 19: STREET PAVING, 6.

PLEA IN ABATEMENT.

1. A plea in abatement in a replevin suit, that the defendant took the goods as deputy United States marshal on an execution issued out of the United States circuit court against a third person named, which fails to aver that the execution was issued on any judgment, or that any judgment had been obtained against either the plaintiff in replevin or the defendant in the execution, or that the property had been levied upon as belonging to the defendant in execution, is held bad on demurrer.—*Heyman v. Covell*, 157.
2. A plea in abatement to the jurisdiction must always show another forum where the rights have already become subject to judicial authority. It must also be certain according to the most rigid rules of precision.—*Ibid*.
3. The pendency of another suit involving the same matters, if relied upon at all, must be pleaded in abatement; and it is not a bar.—*Sullings v. Goodyear Dental Vulcanite Co.*, 313.
See RECEIPTS, 1.

PLEA PUIS DARREIN CONTINUANCE.

1. A plea *puis darrein continuance* operated at common law to destroy the issue previously formed, and required a new issue to be formed, by replication or otherwise.—*Johnson v. Kibbee*, 269.
2. The statute (*Comp. L. 1871*, § 5792) abolishing special pleas was not designed to deprive the defendant of the right to make a special defense of matters arising subsequent to the filing of his plea of the general issue; and *section 5794*, requiring notice of special matter of defense to be annexed to the plea of the general issue, does not operate to require notice to be so given of matters which if pleaded specially would be inconsistent with and destroy the general issue, and does not apply to the case of pleas *puis darrein continuance*.—*Ibid*.

POLICE COURT OF DETROIT.

See FINES, 4.

POLICY.

See INSURANCE, 4-9: LEGISLATIVE AUTHORITY, 1: PROMIS-
SORY NOTES, 4.

POLICY HOLDER.

See INSURANCE, 11.

POPULAR VOTE.

See MANDAMUS, 10.

POSSESSION.

See ATTACHMENT, 7: EQUITY JURISPRUDENCE, 3: FORECLOS-
URES, 18: LEASES, 3-7: MORTGAGES, 16: SALES, 3, 4.

POSSESSORY RIGHTS.

See ATTACHMENT, 7.

POSSIBILITY COUPLED WITH AN INTEREST.

See ASSIGNMENT, 4-6.

POWER OF SALE.

See FORECLOSURES, 22, 23.

PRACTICE IN CIRCUIT COURTS.

1. It is not a valid charge of error that special questions to the jury were put and answered in the court room. It is never necessary to require the jury to withdraw unless they desire it.—*Bottomley v. Goldsmith*, 27.
2. There is no absolute right on the part of counsel for defendants to cut off further argument to the jury by plaintiffs' counsel by declining to reply to the opening argument on plaintiffs' behalf, at least where other counsel for plaintiffs desire to be heard; but this matter comes within those discretionary rules, which must, unless in extreme cases, leave the trial judge to determine the course of the procedure. It is the duty of the judge, however, to so regulate this matter as to give a fair opportunity for counsel to thoroughly present the whole case to the jury.—*Barden v. Briscoe*, 254.
3. It is sometimes proper to allow the jury to take to the jury-room documents which have been admitted in evidence, but it

should not be allowed except in cases where the propriety of it is very obvious, and in general not when either party objects.—*Kalamazoo Novelty Manf. Co. v. McAlister*, 327.

4. The permitting the jury against objection to take with them to their room a book of which only three pages had been introduced in evidence, with no other safeguard against their examining and giving consideration to those parts of the book which had not been made evidence, except a direction to them to look only on a specified page, is held to be error.—*Ibid.*
5. Where on defendant's motion, an order to hold to bail is vacated, it is within the discretion of the circuit judge, as a part of the order vacating the same, to require defendant to enter his appearance in the cause.—*Randall v. Judge of Wayne Circuit*, 500.

See EJECTMENT, 1: EVIDENCE, 4, 5: FINDING OF FACTS, 3: JUSTICE'S COURTS, 2: PLEA PUIS DARREIN CONTINUANCE, 1, 2: PRACTICE IN SUPREME COURT, 5-7: SPECIAL QUESTIONS TO THE JURY: TRESPASS TO LANDS, 4.

PRACTICE IN SUPREME COURT.

1. An objection that the judgment is not supported by the evidence cannot prevail where the record does not show that all the evidence is reported and where the evidence reported has some tendency to support the finding. The weight of the evidence will not be considered, nor will error be presumed.—*Young v. Taylor*, 25.
2. Objections to rulings on evidence, relating to a deposition which is not printed in the bill of exceptions, and others which are not noticed in the brief of plaintiff in error, are not considered.—*Hurd v. Newton*, 35.
3. Where one of three partners is defending against a draft, drawn in the firm name by one of his partners to be used to pay the individual debt of the third partner, the submission to the jury of the question whether he did not authorize the giving of the draft, or ratify it afterwards, will not be held to be error where it appears that he was himself questioned as a witness on this subject and answered fully, but none of his evidence is given in the record. Error will not be presumed.—*Ibid.*
4. The refusal of special requests to charge is not error where the charge as given is full, clear and explicit on the points involved, and as favorable to the party complaining of it as the case would warrant.—*Ibid.*
5. To sustain an allegation of error which complains of the exclusion of evidence offered, the bill of exceptions must make it affirmatively appear that the exclusion was error. In sub-

- mitting a proposition of proof, counsel are bound to be distinct and clear, and the proposition should embody the specific fact or facts in such connection and in such terms as to be apprehended and ruled in the intended sense by the trial judge, and to be examined and applied in the appellate court in the proper light to test the accuracy of the ruling if an adverse one.—*Reynolds v. Continental Ins. Co.*, 131.
6. Where a trial court has excluded a proposition of proof, his decision, if correct as it appeared, cannot be questioned in an appellate court upon the claim of the party who made the offer, that the proposition covered some implied meaning which required a different ruling.—*Ibid.*
 7. And where the trial judge's construction of the meaning of a proposition of proof is virtually assented to by counsel at the time, the correctness of that construction ought not to be afterwards questioned in the court of review, unless at least the new construction sought to be imposed upon it is one to which it is fairly open.—*Ibid.*
 8. The objection that the judgment embraced more interest than was allowable, is not considered, the difference being so trifling as to be insignificant.—*Bowen v. School District, etc.*, 149.
 9. Where a cause was tried by the court without a jury and a special finding filed, the correctness of the conclusions of fact cannot be considered in a court of review, but must be assumed to have been warranted by the proofs; and if the findings of fact justify the judgment, it is immaterial whether specific legal conclusions are rightly drawn.—*Gillam v. Boynton*, 236.
 10. On the question whether a finding of facts is supported by the evidence, the conclusion of the judge is not to be set aside because in the opinion of the court of review he has erred in his judgment on the facts, provided there was some evidence to support it; the weight of the evidence is not to be reconsidered.—*Gano v. Heath*, 441.
 11. It appearing that hearsay evidence was admitted against objection, and the case not having been argued for defendant in error, the judgment is reversed for the erroneous admission of the hearsay evidence, and the other questions raised are not considered.—*Brownell v. Groesbeck*, 501.
- See ATTORNEYS, 1-5: CHARGE TO THE JURY, 5: FINDING OF FACTS, 4: LEGISLATIVE AUTHORITY, 1, 2: MANDAMUS, 11.

PRECISION.

See PLEA IN ABATEMENT, 2.

PREMATURE ACTION.

See TAXATION, 1.

PREMATURE DECREE.

See EQUITY PLEADING AND PRACTICE, 1.

PREMIUM.

See PROMISSORY NOTES, 4.

PRESENTATION OF CLAIM TO COUNCIL.

See STREET PAVING, 6.

PRESIDENT.

See BANKS, 1-3.

PRESUMPTIONS.

See ASSIGNMENT, 2: ATTACHMENT, 3: EVIDENCE, 10: FINDING OF FACTS, 7: HUSBAND AND WIFE, 2: INFANTS, 2: PROMISSORY NOTES, 4: TAXATION, 1.

PREVIOUS PAROL AGREEMENT.

See GROWING CROPS, 2.

PRIMA FACIE CASE.

See EVIDENCE, 2.

PRIMARY SCHOOL LANDS.

See FRAUD, 6.

PRINCIPAL AND AGENT.

See AGENCY, 1-4.

PRINCIPAL AND SURETY.

See MORTGAGES, 13.

PRIORITY.

See MORTGAGES, 4.

PROBATE COURT.

See EMINENT DOMAIN: GUARDIAN SALES, 1-6: MANDAMUS, 14.

PROCEEDINGS.

At law: See FORECLOSURES, 12.

To disbar: See ATTORNEYS, 1-7.

PROCESS.

See FORECLOSURES, 13.

PROHIBITORY LIQUOR LAW.

1. Where an order for liquors is taken in this state by the vendor in person, and the goods are afterwards shipped from Ohio and delivered to the vendee here, the contract is a Michigan contract; and whether the contract of sale be executory, or actually completed by delivery, it is equally invalid under the Michigan liquor law (*Comp. L.*, § 2137), which declared void not only all sales, but all contracts or agreements relating thereto.—*Webber v. Howe*, 150.
 2. The circumstance that the original order was an oral one and void under the statute of frauds, could not operate to make the transaction an Ohio contract; for, if void originally, it would not become binding upon the purchaser until he did something in ratification of it, as by accepting the goods. His void order could not make any carrier to whom the vendor should see fit to deliver the goods his agent.—*Ibid*.
 3. The prohibitory liquor law having expressly declared contracts the consideration for which in whole or in part was the sale of liquors utterly null and void, and provided that all moneys and securities received on such sales should be treated as received without consideration, and that they might be recovered back, a sale made in violation of this statute while it was in force is not validated by a subsequent repeal of the statute, "saving all actions pending and all causes of action which have accrued." Such a repealing law, instead of indicating the purpose to validate prior unlawful sales, indicates the contrary purpose.—*Ibid*.
- See FINDING OF FACTS, 6, 8: PROMISSORY NOTES, 1-3: SET-OFF.

PROMISE.

- To forbear: See CONTRACTS, 7.
- To pay debt of another: See STATUTE OF FRAUDS, 2-6.
- To pay execution: See RECEIPTS, 4.
- To pay for goods furnished to another: See STATUTE OF FRAUDS, 1.
- To third person: See PARTNERSHIP, 1, 3.
- To withhold moneys for plaintiff: See STATUTE OF FRAUDS, 6.

PROMISSORY NOTES.

1. A purchaser of negotiable paper is not put upon inquiry by mere knowledge that the payee is engaged in selling intoxicating liquors, to ascertain whether the consideration of the paper was not the unlawful sale of such liquors.—*Bottomley v. Goldsmith*, 27.

2. Proof that the consideration of a promissory note upon which suit is brought was the unlawful sale of intoxicating liquors, throws upon the plaintiff the burden of showing that he bought the note in good faith and before it fell due.—*Paton v. Cott*, 5 Mich., 505.—*Ibid*.
3. In an action upon a promissory note, where the plaintiff claims to be a *bona fide* holder and the defense set up is that the consideration of the note was the unlawful sale of intoxicating liquors, the failure of the jury to answer the special inquiry, whether the plaintiff, knowing the business of the payees, did not purposely avoid making any inquiries as to the consideration of the note, is of no consequence, as the question was not a material or proper one to put to the jury.—*Ibid*.
4. In an action upon a note, given for a premium upon a policy of insurance, which is payable generally, and makes no mention of the place where made, it appearing that the plaintiff is a foreign corporation, it will not be presumed, in the absence of any thing showing where the policy for which the note was given was issued, that it was a Michigan policy, and was issued, and the note given for it, in violation of the laws of the state applicable to foreign insurance companies doing business here.—*American Insurance Co. v. Cutler*, 261.
5. An assignee of a mortgage given to secure the payment of a negotiable note is held entitled to the same protection that he would have as assignee of the note without the mortgage.—*Helmer v. Krollick*, 371.
6. A note which is payable "on or before three years from date" is not due until the three years has expired; and a purchaser for value within that time is entitled to the same protection as if the note were made payable three years from date.—*Ibid*.
7. It cannot render a purchase of negotiable paper suspicious that the payee has an interest in getting it off his hands; this fact would not necessarily be known to the purchaser, or influence in any manner his action; and in determining whether a purchaser is entitled to be considered a *bona fide* holder, it is his *bona fides*, and not that of the payee, that is in question.—*Ibid*.
8. The fact that the purchaser of negotiable paper, resident in a distant part of the state, employs to collect the same a person who is also agent for the payee, is not very significant as indicating want of good faith in the purchase.—*Ibid*.
9. Where one of two joint makers of a promissory note obtains of the payee an extension of the time of payment and procures an additional name to the note, this will not release the other maker, though as between the makers the latter

claims to be surety only, the payee having no notice of any such relation.—*Gano v. Heath*, 441.

10. A note payable on demand is payable at once and without demand, so that the statute of limitations runs from its delivery; and this rule has been applied where from the form of the contract it was manifest immediate payment was not expected; and a note payable thirty days after demand is within the same principle.—*Palmer v. Palmer*, 487.

See CERTIFICATES OF DEPOSIT, 1-4: CONTRACTS, 17: FINDING OF FACTS, 6-8: GUARANTY, 1, 2: MARRIED WOMEN, 2: MORTGAGES, 4-6, 10-13.

PROMPTNESS.

See AMENDMENTS, 4.

PROOFS.

Of loss: See EVIDENCE, 2: INSURANCE, 3, 4.

Of service: See AMENDMENTS, 2.

See DIVORCE, 1-3: EQUITY PLEADING AND PRACTICE, 2, 6: FORECLOSURES, 19-21.

PROPERTY.

Appropriated: See STREET PAVING, 3-6.

Of stranger: See EXECUTIONS, 1, 2.

Purchased: See MARRIED WOMEN, 1, 2.

PROPOSITIONS.

Of fact: See REQUESTS TO CHARGE, 4.

Of proof: See EVIDENCE, 4, 5: PRACTICE IN SUPREME COURT, 5-7.

PROSECUTRIX.

See RAPE, 1-3.

PUBLICATION.

See FORECLOSURES, 13.

PUBLIC CORPORATIONS.

See WILLS, 5.

PUBLIC IMPROVEMENTS.

See STREET PAVING, 1-6.

PUBLIC LETTING.

See STREET PAVING, 1-6.

PUBLIC POLICY.

See **CONTRACTS**, 10.

PUBLIC PROSECUTIONS.

See **CONTRACTS**, 12.

PUBLIC SCHOOL PURPOSES.

See **WILLS**, 2.

PUBLIC WORKS.

See **MUNICIPAL CORPORATIONS**, 2, 3.

PURCHASE PRICE.

See **LAND CONTRACTS**, 1, 2.

PURCHASER.

With notice: See **CHATTEL MORTGAGES**, 2.

See **EXECUTIONS**, 3: **FORECLOSURES**, 10: **GROWING CROPS**, 1-3.

PURCHASES.

See **MARRIED WOMEN**, 1, 2.

QUANTUM MERUIT.

See **EVIDENCE**, 17: **STREET PAVING**, 1-6.

QUESTIONS.

For jury: See **CHARGE TO THE JURY**, 4-6: **EQUITY JURISPRUDENCE**, 5.

Of fact: See **ATTORNEYS**, 4, 5: **BANKS**, 5: **LAND CONTRACTS**, 2: **PRACTICE IN SUPREME COURT**, 3: **REPLEVIN**, 2.

Of law: See **REPLEVIN**, 2.

RAFTS.

See **WAIVER**, 1, 2.

RAILROADS.

See **EMINENT DOMAIN**.

RAPE.

1. On a trial for rape, the admission in evidence of the statement of the sister of the prosecutrix, that the latter made complaint to her the next morning that the prisoner on trial

- and another person named forced her in her chamber the evening before, is held not error.—*Brown v. People*, 203.
2. Where on a trial for rape the act of intercourse is admitted, and the vital question is, whether it was by force and against the will of the prosecutrix, the jury must be satisfied beyond a reasonable doubt that she did not yield her consent during any part of the act; and considering the place, time, occasion and surrounding circumstances disclosed by this case, it was important the jury should scrutinize the facts bearing on this point very closely.—*Ibid.*
 3. A charge to the jury in a rape case, that if they should find respondent used force, and complainant resisted so far as she was able to under the circumstances, they should find him guilty, even though they found she at last yielded, is held erroneous and misleading; the term "circumstances," as here used, may have been understood as including weakness of the will; and the term "yielded," as meaning an assent to the consummation or completion of the act; and if there was a yielding in that sense, there was no case to support a verdict of guilty.—*Ibid.*
 4. The evidence on the part of the people being that the prosecutrix never yielded, and that on the part of the accused that she made no resistance, but assented from the beginning, there was no basis for a charge on the hypothesis of her having first made resistance but afterwards yielded.—*Ibid.*

RATIFICATION.

See BANKS, 3-5: CONTRACTS, 1, 2, 8-16: INFANTS, 1: INSURANCE, 12: PROHIBITORY LIQUOR LAW, 2: SCHOOL DISTRICTS, 9.

REASONABLE TIME.

See CONTRACTS, 7.

REASONS.

See ATTORNEYS, 5.

RECEIPT.

See TOWNSHIPS, 2.

RECEIPTORS.

1. In an action against one of three receiptors upon a receipt given to an officer for goods he had seized upon executions, and conditioned for a delivery of the goods to the officer on demand or in default thereof to pay the executions, an objection that the receipt was improperly admitted under the

declaration as evidence of a contract with defendant, is held not well taken, where the declaration did not disclose a joint liability and the defendant failed to plead the non-joinder in abatement.—*Bowen v. Culp*, 224.

2. An offer to turn out the property after the return day of the executions, and the refusal of the officer then to accept the same, is no defense to an action on the receipt; as the officer under the statute (*Comp. L. 1871, §§ 5424-5*) could not sell the property after the return day of the executions, he very properly refused to receive it then.—*Ibid*.
3. A demand made by any other person properly authorized by the officer to make it, would have the same force as a demand by the officer in person, to fix the liability of the receiptor in case of his failure to comply with it.—*Ibid*.
4. The reply of the receiptor to a demand for the return of the goods for which he receipted, that he would pay up the executions, was admissible in evidence to show under which clause of the receipt he chose to be bound; and where no recovery was sought or claim based upon such oral promise alone, it was not error that the court declined to instruct the jury that such oral promise was void under the statute of frauds.—*Ibid*.

RECEIVERS.

See FORECLOSURES, 8, 18: REPLEVIN, 1.

RECOGNITION.

See SUPERINTENDENTS OF THE POOR, 3, 4.

RECONVEYANCE.

See FRAUD, 3.

RECORD.

See AMENDMENTS, 1-4: ASSIGNMENT, 2: CHARGE TO THE JURY, 5: EVIDENCE, 1, 3: FORECLOSURES, 29: GUARDIAN SALES, 6: MANDAMUS, 6-8: PLATS, 1: PRACTICE IN SUPREME COURT, 1-3: TAXATION, 8, 14, 15: TOWNSHIP DRAIN COMMISSIONER, 2.

REDEMPTION.

See EQUITY JURISPRUDENCE, 9: FORECLOSURES, 23, 27, 29, 31.

REFEREES.

See FINDING OF FACTS, 4, 5.

REFERENCE.

See ATTORNEYS, 2: FORECLOSURES, 14.

36 MICH.—73.

REGISTRY.

See BONA FIDE PURCHASERS: CHATTEL MORTGAGES, 1: EVIDENCE, 1: HUSBAND AND WIFE, 4: PLATS, 1.

REHEARING.

See ATTORNEYS, 2.

RELATOR.

See SCHOOL DISTRICTS, 3, 4.

RELEASE.

See CONTRACTS, 20: MORTGAGES, 18: PROMISSORY NOTES, 9: SURETIES, 1: VENDOR'S LIEN, 1, 2.

RELEVANCY.

See BANKS, 1: EVIDENCE, 16: MONEY HAD AND RECEIVED, 3.

REMEDY.

At law: See EQUITY JURISPRUDENCE, 2-6.

See ASSIGNMENT, 5: ESTATES OF DECEASED PERSONS, 1: MANDAMUS, 1, 2, 14.

REMOVAL FROM OFFICE.

See SUPERINTENDENTS OF THE POOR, 1-4.

REMOVAL OF COUNTY SEAT.

Proceedings to remove a county seat, which fail to designate the place to which the proposed removal is to be made, are held invalid.—*Pack v. Supervisors of Presque Isle County*, 377.

RENEWALS.

See INSURANCE, 7-9.

RENT.

See DECLARATION, 7.

RENTS AND PROFITS.

See FORECLOSURES, 18.

REPEAL.

See PROHIBITORY LIQUOR LAW, 3.

REPLEVIN.

1. A bill in equity having been filed to foreclose a mortgage covering real and personal property, and a receiver having been appointed and having taken possession of the personal property, it was held, in a replevin suit afterwards brought against such mortgagee and receiver by a subsequent purchaser from the mortgagor, who had been made defendant to the foreclosure bill, that the questions of the sufficiency of the description of the property in the mortgage to affect a purchaser with only constructive notice, and whether such subsequent purchaser had any actual notice, were questions to be raised in the first suit, and not by attacking the proceedings therein through an action at law; that the same question could not be tried in both suits, and much less could a party remove it from one court to another in this collateral way.—*Austin v. French*, 199.
2. The submission to the jury of the question of the sufficiency of the description in the mortgage as a question of fact, is held to be error.—*Ibid.*
3. The question of the validity of the mortgage as a lien on the property intended by it in the hands of the plaintiff in replevin, belonged to the court of chancery in the foreclosure suit; in the replevin suit the plaintiff must recover, if at all, by establishing the fact that the property described in the writ was property not covered by the mortgage, and as to any property embraced in the mortgage, the replevin suit must fail.—*Ibid.*
4. In an action of replevin for an undivided interest in a crop of wheat standing in shocks, the defendant, having no interest in the other undivided half, cannot raise the point that the wheat being undivided when the writ issued, the action could not be maintained.—*Crapo v. Seybold*, 444.
See PLEA IN ABATEMENT, 1.

REPLY.

See PRACTICE IN CIRCUIT COURTS, 2.

REPORT.

Of amount due: See FORECLOSURES, 6.

On contingent claims: See ESTATES OF DECEASED PERSONS, 4.

REPRESENTATIVE DISTRICTS.

1. The legislature has authority, except as prohibited by the restrictions of the constitution (*Art. IV., § 4*), to change the boundaries of representative districts, and this power is not lodged exclusively with the supervisors.—*People v. Bradley*, 447.

2. The constitutional requirement that each apportionment and the division into representative districts, etc., shall remain unaltered until the return of another enumeration (*Art. IV., § 4*), does not preclude the legislature, at its first session after a new enumeration, from enlarging the boundaries of a city so as to take in territory before belonging to another representative district, though the new apportionment has not yet been actually made.—*Ibid.*
3. It is competent in an act the title of which expresses the idea of defining and making distinct the boundaries of a city, to provide for enlarging and extending the city limits so as to take in new territory; the word "define," as applied to territorial limits, in its broadest sense, means something more than to determine boundaries already established; and the constitutional limitation, requiring the object of the law to be expressed in the title, was not designed to confine the legislature to the use of words in their most restricted sense in the titles of acts.—*Ibid.*

REPUDIATION.

See INFANTS, 3, 4.

REPUTATION.

See DIVORCE, 3: EVIDENCE, 9, 10.

REQUESTS TO CHARGE.

1. A request to charge calling for an imperative and unqualified charge, that the father is entitled to the earnings and wages of his minor son, is clearly improper, and its rejection is not error.—*Schoenberg v. Voigt, 310.*
2. A request to charge, which implied a claim by the opposite party which had not in fact been made by him, is held erroneous, and properly refused.—*Ibid.*
3. The rejection of a request to charge that is so obscure as not readily to have been understood by the jury, is not error.—*Ibid.*
4. The rejection of requests to charge which simply embody propositions of fact, and convey no instruction in point of law, or which are not applicable to the case, is not error.—*Ibid.*

See PRACTICE IN SUPREME COURT, 4.

RES ADJUDICATA.

See EQUITY JURISPRUDENCE, 8: EVIDENCE, 19: FORECLOSURES, 8, 9: REPLEVIN, 1, 3.

RESALE.

See **MANDAMUS**, 7, 8.

RESCISSION.

See **FRAUD**, 3: **LAND CONTRACTS**, 1, 2.

RESISTANCE.

See **RAPE**, 2-4.

RESPONSIVE.

See **EQUITY PLEADING AND PRACTICE**, 6.

RETIRING PARTNER.

See **PARTNERSHIP**, 1-3.

RETROACTIVE EFFECT.

See **TAXATION**, 7.

RETURN.

Of service: See **AMENDMENTS**, 5-7.

See **LEGISLATIVE AUTHORITY**, 2: **TAXATION**, 12-15.

RETURN DAY.

See **RECEIPTORS**, 2.

REVIEW.

Of motion: See **MANDAMUS**, 6-8.

See **TAXATION**, 1.

REVIVOR.

See **INSURANCE**, 11.

REVOCABLE BAILMENT.

See **SALES**, 3.

REVOCATION.

See **SALES**, 3.

RIGHT.

Of action: See **ASSIGNMENT**, 1-3.

- Of possession: See ATTACHMENT, 1, 2, 7: FORECLOSURES, 18:
LEASES, 3-7: MORTGAGES, 16: SALES, 3.
To conveyance: See ATTACHMENT, 8, 11.
To purchase: See LEASES, 6.
To redeem: See FORECLOSURES, 31.

RULE.

- Of evidence: See TRESPASS TO LANDS, 2.
Of pleading: See TRESPASS TO LANDS, 2.

RULINGS.

- On evidence: See PRACTICE IN SUPREME COURT, 2, 3.
That do not prejudice: See MONEY HAD AND RECEIVED, 3.

SALARY.

- See CORPORATIONS, 1, 2: COUNTY CLERK, 1-3.

SALES.

1. Where a debtor has turned out to a creditor in payment of the debt certain specified piles of lumber, which were designated and marked, and put into the charge of a person who accepted the duty, for the vendee, though in the general employ of the vendor, the transaction amounts to a completed sale and transfer of the title, though the amount was to be ascertained by future measurement and the purchase price to be determined by future inspection, the vendee to pay any excess of the purchase price over his debt, and the vendor to make good any deficiency.—*Cohoe v. Keystone Iron Co.*, 51.
2. There is no principle of law which precludes a person from acting as agent for two principals. And it is competent for a person in the employ of the vendor, to accept, by consent of all parties, as the agent of the vendee, the delivery of the property sold; and the agency of the keeper concerning the lumber in such case would be single throughout.—*Ibid.*
3. The transfer of the possession of property by the vendor to the purchaser to be held by him until future measurements and computation should be made, though not under circumstances such as to make the sale a completed one at the time, would nevertheless give a right of possession which could not be revoked by the vendor or any one having no superior rights; possession given under any contract for contract purposes is rightful as between the parties, and not a mere revocable bailment.—*Ibid.*
4. It is competent for parties to contract to make a present sale, with possession, of a growing crop of wheat, payment therefor to be made at a future day in oats instead of money;

and such a contract when made would be binding and would pass the title to the wheat, precisely as if the future payment were to be in money.—*Crapo v. Seybold*, 444.

In parcels: See FORECLOSURES, 31.

See ATTACHMENT, 9, 10: CONTRACTS, 17: EQUITY JURISPRUDENCE, 7: EXECUTIONS, 3: FORECLOSURES, 3-6, 10-12, 17, 22-30: GROWING CROPS, 1-3: PROHIBITORY LIQUOR LAW, 1-3: RECEIPTORS, 2: TAXATION, 13-15.

SAW BILL.

See MORTGAGES, 4-6.

SCALING.

See MORTGAGES, 7.

SCHOOL APPARATUS.

See WILLS, 3.

SCHOOL DISTRICT ORDERS.

See IMPLIED PROMISE.

SCHOOL DISTRICTS.

1. The disbursement of all school moneys is required by the statute (*Comp. L., 1871, §§ 3623, 3612, 3609*) to be made by orders drawn on the assessor by the director and countersigned by the moderator; and all moneys belonging to the district in the town treasurer's hands are required to be paid to the assessor on warrants drawn by the director and countersigned by the moderator. The assessor is made treasurer of the district, and required to hold all district moneys until properly drawn out by warrant. It is made the express duty of the director to draw and sign warrants upon the township treasurer, payable to the assessor, for all moneys raised for district purposes, or apportioned to the district by the township clerk, and present them to the moderator to be signed; and it is made the duty of the moderator to countersign such warrants.—*Burns v. Bender*, 195.
2. District moneys in the hands of the town treasurer are not subject to be applied to any district purpose except through the hands of the assessor. And the duty of suing to thus transfer them into the custody of the assessor if qualified, is laid on the director; and the duty of procuring this transfer within some reasonable time is not discretionary, but absolute. The moderator is bound under ordinary circumstances to countersign all orders of the director for that pur-

- pose; and if he refuses in a proper case to do so, *writ* will lie to compel him.—*Ibid.*
3. The statute making it the duty of the director to present the warrant to the moderator for signature, he may properly be a relator to obtain it by compulsion of law when refused. He is the proper custodian of the completed warrant, for the purpose of delivery to the assessor.—*Ibid.*
 4. The query is suggested, whether the assessor would not also be a competent relator.—*Ibid.*
 5. The town treasurer has no authority to make payments of district moneys, even to the assessor, except upon the warrant prescribed by statute; and no payment not authorized by warrant is a valid official payment, such as to preclude the district from holding him responsible for moneys lawfully in his hands. Payments made otherwise than in the prescribed mode are made in his own wrong, and cannot diminish the fund for which he is responsible.—*Ibid.*
 6. Respondent occupying the double position of moderator and town treasurer, is not thereby authorized to set up his previous illegal disbursements of the district moneys as treasurer as an excuse for not doing his duty as moderator; his double functions will not relieve him in one capacity from doing his duty in another.—*Ibid.*
 7. National Business Multiplication Charts, being charts or cards containing the multiplication table, practical forms of business contracts, and also brief mention of prominent historical events, and designed for use in school-rooms, are held not to be necessary appendages for the school-house, within the meaning of the statute (*Comp. L. 1871, § 3618*), such as the director is required to provide.—*Gibson v. School District No. 5 of Vevay, 404.*
 8. There was no such necessity for the purchase of these charts as would bring the case within the principles of *School District v. Snell, 24 Mich., 350.*—*Ibid.*
 9. The purchase of these charts by the director, without instructions from the district board, being unauthorized and void as to the district, his retention of them, and occasionally placing them in the school-house, could not operate as a ratification by the district of his unauthorized purchase.—*Ibid.*
 10. Where a school-district is parceled out among three other existing districts, the latter cannot be held jointly liable for a debt of the former district; whatever they are bound to pay must be a several, and not a joint obligation.—*Halbert v. School Dists., etc., 421.*
- See EVIDENCE, 5: WILLS, 1-5.

SCHOOL LIBRARIES.

See FINES, 2: WILLS, 1-5.

SCHOOL MONIES.

See **SCHOOL DISTRICTS**, 1-6.

SCHOOL TAXES.

See **EVIDENCE**, 15: **TAXATION**, 11.

SEAL.

See **PLATS**, 1.

SEARCH.

See **EVIDENCE**, 2.

SECOND AND THIRD MORTGAGES.

See **FORECLOSURES**, 3-6: **MORTGAGES**, 3.

SECONDARY EVIDENCE.

See **EVIDENCE**, 1, 2.

SECOND DEED.

See **FRAUD**, 1-4.

SECRET DESIGN.

See **MORTGAGES**, 15.

SECURITIES.

See **CONTRACTS**, 14.

SECURITY.

See **MORTGAGES**, 16.

SEPARATED BY PUBLIC HIGHWAY.

See **CURTILAGE**.

SEPARATE MAINTENANCE.

See **CONTRACTS**, 13.

SERVICE.

Of process: See **AMENDMENTS**, 2: **FORECLOSURES**, 13.

38 MICH.—79.

SERVICES.

Of minor: See EVIDENCE, 17, 18.

See CORPORATIONS, 1, 2: EVIDENCE, 12: STATUTE OF FRAUDS, 4-6.

SET-OFF.

A defendant may recover by way of set-off for moneys previously paid by him to the plaintiff for liquors, and which moneys, according to the law then in force, were paid without consideration.—*Webber v. Howe*, 150.

See ASSIGNMENT, 3.

SETTING ASIDE JUDGMENT.

See JUSTICE'S COURTS, 1.

SETTING SALE ASIDE.

See FORECLOSURES, 10, 11.

SETTLEMENT.

1. A fraud cannot be separated into two causes of action, and one settled for and the other left open; it is and must be an entirety. And a demand for the fraudulently selling by defendants to the plaintiff of property not their own, which has been paid for partly in plaintiff's own money and partly with obligations of another, the transaction being a single one, cannot be split up and the fraud settled for so far as it applied to the cash purchase, and the controversy left open as to the residue.—*Allison v. Connor*, 283.
2. And where a settlement is admitted, the controversy being whether it was a full accord and satisfaction or confined to the portion of the property for which plaintiff paid in his own money, and there being no evidence that it was expressly agreed to leave some portion of the controversy outside the settlement, a charge that if there was a full accord and satisfaction of plaintiff's individual claim, or if he released any claim or demand he had in his individual name, there could be no recovery, is held not error.—*Ibid.*

See CONTRACTS, 8-16: FORECLOSURES, 20: MONEY HAD AND RECEIVED, 2, 3: TOWNSHIPS, 2.

SEVERAL INSTRUMENTS.

See MORTGAGES, 4-7.

SEVERAL LIABILITY.

See STATUTE OF FRAUDS, 1.

SEVERAL NOTES.

See **MORTGAGES**, 12, 13.

SEWERAGE.

See **MUNICIPAL CORPORATIONS**, 3-8.

SHOWING OF FACTS.

See **MANDAMUS**, 6-8.

SIGNATURE.

See **CHARGE TO THE JURY**, 1: **TAXATION**, 12.

SILENCE.

See **BANKS**, 4, 5.

SON.

See **EVIDENCE**, 17, 18: **REQUESTS TO CHARGE**, 1.

SPECIAL ASSESSMENT.

See **STREET PAVING**, 6.

SPECIAL COUNT.

See **DECLARATION**, 6.

SPECIAL FINDING.

See **FINDING OF FACTS**, 1-2: **MARRIED WOMEN**, 2: **PRACTICE IN SUPREME COURT**, 9: **STATUTE OF FRAUDS**, 2.

SPECIAL PLEAS.

See **PLEA PUIS DARREIN CONTINUANCE**, 1, 2.

SPECIAL PROCEEDING.

See **DISSOLUTION OF ATTACHMENT**, 3.

SPECIAL PROPERTY.

See **FRAUDULENT CONVERSION**, 2, 3.

SPECIAL QUESTIONS TO THE JURY.

The court on an ejectment trial having directed the jury to find a verdict for the plaintiff, submitting to them special questions propounded as to the value of the premises and of the

improvements, the refusal to submit special questions proposed by defendants upon other subjects, is held not erroneous, for the reason that the answers would under the circumstances be immaterial under such a charge.—*Brooks v. Fairchild*, 231. See PRACTICE IN CIRCUIT COURTS, 1: PROMISSORY NOTES, 3.

SPECIAL REQUESTS.

See PRACTICE IN SUPREME COURTS, 4.

SPECIAL RISKS.

See INSURANCE, 1, 2.

SPECIFIC CHARGE.

See MORTGAGES, 3.

SPECIFIC CHATTELS.

See ATTACHMENT, 3, 4.

SPECIFIC FEES.

See COUNTY CLERK, 3.

SPECIFIC PERFORMANCE.

1. One who held a part paid certificate for state university lands, and which he had mortgaged, having sold to complainant his remaining interest and put him in possession, and then subsequently assigned his certificate to another person who advanced the money to take up the mortgage and to pay the balance due the state and thereupon obtained a state patent, a bill in equity against the original owner, the mortgagee and the subsequent purchaser, for specific performance of complainant's contract and to enjoin ejectment, is sustained.—*Rogers v. Odell*, 411.
2. A written contract being set up in the bill and produced in proof, which is complete in itself, it was held that it was not impeached by an averment in the sworn answer that it constituted but part of the entire contract of which the residue was reduced to writing and in complainant's possession, nor by contradictory and unsatisfactory proofs by parol of an agreement not supplementary to the writing produced and proved.—*Ibid.*
3. The failure of the vendor to take any steps to forfeit the contract or to demand further payment or to dispossess the vendee, when if his version of the contract were true there were several installments past due and unpaid, and the acceptance as satisfactory of payments which were much less than

is now asserted to have been due at the time, are significant facts tending to discredit his testimony.—*Ibid.*

4. It requires very strong equities to induce a court to refuse to enforce a written contract, even where a mistake is alleged to have been made in drawing it up.—*Ibid.*

SPLITTING UP CAUSES OF ACTION.

See SETTLEMENT, 1, 2.

STALE CLAIMS.

See EQUITY JURISPRUDENCE, 1.

STATE AND COUNTY.

See MANDAMUS, 5: TAXATION, 5-9.

STATEMENT.

Of facts: See AFFIDAVIT FOR CAPIAS.

Of plaintiff: See CHARGE TO JURY, 8.

STATE OFFENSES.

See FINES, 1-4.

STATE PATENT.

See SPECIFIC PERFORMANCE, 1.

STATE POLICY.

See SUPERINTENDENTS OF THE POOR, 2.

STATE TAX.

See TAXATION, 2-4.

STATE TAX BIDS.

See TAXATION, 8.

STATE UNIVERSITY LANDS.

See SPECIFIC PERFORMANCE, 1.

STATUTE OF FRAUDS.

1. Defendant having gone to plaintiff and orally stated to him that for such goods as he should thereafter furnish to a third person named he would pay him, it is held that to take the promise out of the statute of frauds and make the defendant legally liable it is essential that plaintiff should thereupon have absolutely discharged such third person from liability,

- and looked only to defendant for payment; under no circumstances could he hold each liable severally, at his option.—*Welch v. Marvin*, 59.
2. In an action to recover the price of board and supplies furnished to laborers and employés of a sub-contractor of the defendants, a verdict for defendants, with special findings that such sub-contractor was never agent of defendants, that the agreements were made with him personally, and not as agent, and that the debts sued for were incurred and the articles furnished solely on his credit and engagement, and not on account of defendants, shows that even if defendants had promised to pay the accounts, their promise was within the statute of frauds, as a promise to pay the debt of another.—*Barden v. Briscoe*, 254.
 3. An arrangement by which plaintiff was to cash for defendant orders drawn on defendant by his contractor in payment of employés of the latter, and defendant was to reimburse plaintiff for the moneys so advanced by him, is not within the statute of frauds as a promise to pay the debt of another; such an arrangement is original and direct, and not secondary or collateral.—*Comstock v. Norton*, 277.
 4. A promise to make payment on the debt of another, of sums which the promisor should become liable to pay to the debtor for services to be performed by the latter for him, there being a consideration moving to him which was the inducement for making the promise, is not within the statute of frauds, as a promise to pay the debt of another.—*Calkins v. Chandler*, 320.
 5. While in many cases the test, whether a promise is within the statute of frauds as a promise to pay the debt of another, is, whether the original debtor remains liable on his undertaking and the promise is only collateral thereto, yet where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not.—*Ibid.*
 6. Plaintiffs having a chattel mortgage upon a saw-mill owned by M, it was verbally agreed between plaintiffs, M and defendants, M being then engaged in sawing lumber for defendants, that in consideration of plaintiffs extending the time of payment of said mortgage, M should allow defendants to retain the sum of fifty cents per thousand feet of all lumber thereafter sawed by M for them, and that defendants should pay the same to plaintiffs:—

Held, The promise was valid and not within the statute of frauds; and defendants were bound to withhold from M the proportion of their saw-bill they had thus agreed to pay to plaintiffs, and were liable to plaintiffs for the amount thereof, whether they did or not so withhold it.—*Ibid.*

See PROHIBITORY LIQUOR LAW, 2: RECEIPTS, 4.

STATUTE OF LIMITATIONS.

1. Where a person goes into the service of another upon an indefinite promise of payment for the same, and no price and no period is fixed, the bargain and services are alike continuous, and the statute of limitations does not begin to run against the claim until the service is concluded; the right of action at the close of the service is an entire right and applies to the entire service, and the employé is entitled to claim for the whole amount of all unpaid wages for all the service rendered under the agreement.—*Cartier v. Cartier*, 207.
2. Where a demand is necessary to found an action upon, the demand is barred unless made within the period of the statute of limitations, and the right of action is extinguished by the delay.—*Palmer v. Palmer*, 487.
3. Whatever may have been the prejudice formerly against statutes of limitation, they are now regarded as just and entitled to be fairly construed; and the cause of action should be held to accrue for the purpose of setting the statute in motion, at least where no delay is contemplated, as soon as the creditor by his own act and in spite of the debtor can make the demand payable.—*Ibid.*
4. Upon all demand paper not excepted by the statute (*Comp. L. 1871, § 7151*) from the provisions of the statute of limitations, the time runs from the beginning, without any special demand, and no one can become a *bona fide* purchaser who does not take it within some reasonably short period; to hold otherwise would enable banks to issue certificates of deposit, of any denomination, for circulation as ordinary bank bills, and with like effect.—*Tripp v. Curtentius*, 494.
See PROMISSORY NOTES, 10.

STATUTES CONSTRUED OR COMMENTED UPON.

TERRITORIAL LAWS:

	PAGE.
Vol. 2, p. 362, § 4: Deeds of married women.	32

SESSION LAWS:

1858 p., 178: Assessment roll; supervisor's certificate. . .	63
1861, p. 16: Curative act as to defective deeds and the registry thereof.	234
1867, pp. 3, 4: Constructing drains through or into cities and villages.	477
1869, Vol. 2, p. 399: Charter of Manistee.	9
1873, pp. 511-2: Condemning lands for railroad purposes. .	429
1875, Vol. 1, p. 170: Township drain commissioner. . . .	245
1875, Vol. 1, p. 195: Fraudulent conversion; larceny. . .	307

	PAGE.
1875, Vol. 1, p. 270: Repeal of § 1090, Comp. L. 1871.	75
1875, Vol. 1, pp. 279, 280: Repeal of prohibitory liquor law.	156
1875, Vol. 2, p. 543: Defining boundaries of East Saginaw.	449
COMPILED LAWS OF 1857:	
§ 2350: Taxation; mill tax for school purposes	220
§§ 3076, 3094: Guardians' sales of real estate.	240
§ 4917: Taxation; judgment; townships.	220
COMPILED LAWS OF 1871:	
§ 470: County clerk; clerk of board of supervisors; fees.	11
§ 477, Sub. 7: Raising money for county building purposes.	379
§ 477, Sub. 14: Supervisors; removal of appointees.	417
§ 483: Removal of county seat.	379
§§ 778-9: Line fences; adjoining proprietors; fence viewers.	227
§ 993: Supervisors; equalizing valuation of lands for taxation.	63
§ 1003: Collection of taxes on real estate.	39
§ 1004: Renewal or extension of tax warrant.	40
§ 1014: Suits by town treasurer for unpaid taxes.	39
§ 1025: School taxes.	196
§ 1034: Delinquent tax lists; time of forwarding.	273
§ 1044: Delinquent taxes; tax-sales.	273
§ 1090: Sale of state tax bids; state and county.	75
§ 1129: Taxation; tax-sales; illegal taxes.	221
§ 1345: Plats; acknowledgment; certificate; seal.	123
§§ 1782-3, 1793: Township drain commissioner; appeals.	244-5
§ 1817: Superintendents of the poor.	418
§ 2137: Prohibitory liquor law.	28, 154, 434
§ 2152: Prohibitory liquor law; native wine and beer.	435
§ 2192: Circulating notes of banks; certificates of deposit.	499
§ 3609: School districts; moderator; countersigning orders.	196
§ 3612: School moneys; assessor; director; moderator.	196
§ 3613: School districts; assessor; suits.	197
§ 3618: School districts; director; appendages of school-house.	407
§ 3623: School moneys; warrants; director.	196
§§ 3644-6: School districts; dismemberment.	422
§ 3673: Township libraries.	189
§ 4210: Certificates of acknowledgment.	467
§ 4246: Refusal on demand to discharge satisfied mortgage.	396

	PAGE.
\$ 4269: Dower.	31
\$\$ 4286-7: Dower; widow; election.	31
\$ 4296: Dower; widow.	33
\$\$ 4428-49: Claims against estates of decedents.	432
\$\$ 4464-5: Contingent claims against estates.	432-3
\$ 4628: Levies on equitable interests; supplemental proceedings.	459
\$ 4667: Execution sale of mortgaged property to satisfy mortgage.	487
\$ 4698, Sub. 2: Statute of frauds; debt of another.	60, 255, 280, 321
\$ 4711: Certified copies of chattel mortgages, etc.	70
\$\$ 4803-7: Married woman's act.	47, 227
\$ 5072: Bills to quiet title to lands.	458
\$ 5149: Foreclosures; proceedings at law for deficiency.	286
\$ 5154: Deeds on chancery foreclosure sales.	66
\$ 5200: Orders of probate court enforced by warrant.	431
\$\$ 5424-5: Executions; constables; sales.	225
\$ 5580: Circuit court commissioner; law partner.	260
\$\$ 5596-7: Dissolution of attachment; commissioner disqualified.	260
\$\$ 5792, 5794: Special pleas; notices.	270
\$ 5796: Set-off.	320
\$ 5931: Certified copies of public records.	70
\$ 5968: Evidence; matters equally known to decedent.	214, 403
\$ 6228: Ejectment; tenants in common; ouster.	185
\$ 6231: Ejectment; tenants in common.	243
\$ 6263: Mortgagees; right of possession.	367
\$ 6370-1: Trespass to lands; cutting timber; treble damages.	249
\$ 6918: Foreclosure sales; separate parcels.	471
\$ 7148: Statute of limitations.	209, 490, 499
\$ 7151: Statute of limitations; bank bills, etc.	499
\$ 7152: Statute of limitations; mutual and open accounts.	209
\$\$ 7870-2: Compromises of criminal prosecutions.	354

STATUTORY EXCEPTIONS.

See TRESPASS TO LANDS, 2.

STATUTORY FORECLOSURES.

.See EQUITY JURISPRUDENCE, 9; FORECLOSURES, 22-30.

STOCK OF GOODS.

See CHATTEL MORTGAGES, 1.

36 MICH.—30.

STRANGERS.

See EXECUTIONS, 1, 2.

STREET PAVING.

1. The provisions in the charter of Detroit forbidding the execution of public works except under contract with the lowest bidder, were intended to prevent any action whatever whereby contractors could make private arrangements with the council for payment for work done or to be done in such cases.—*Detroit v. Michigan Paving Co.*, 335.
2. The city, being incapable of contracting in regard to public improvements except by express contract, conforming to the charter conditions, and let under supervision, cannot be held upon an implied contract; and work done in paving a street, or the like, without any contract, would not in any case be a charge against the city; and work partially done under a broken contract, which cannot as a written contract be enforced by suit, stands as if there were no contract, so far as any action is concerned.—*Ibid.*
3. There is no difficulty in bringing actions for *quantum meruit* against corporations, any more than against individuals, so far as they are not guarded by charter against them. Where the city has had money or property belonging to others, it may doubtless be compelled to answer.—*Ibid.*
4. But the city could not be expected or required to detach from the freehold the work not paid for, even if it could be identified, which would be impossible where it was an undistinguishable proportion of an entire job.—*Ibid.*
5. The material not incorporated in the pavement, and which the city has appropriated, it is liable for as for a wrong, and this liability may be enforced in assumpsit, waiving the tort.—*Ibid.*
6. COOLEY, CH. J., *dissenting*, held (1) that the objection that under the contract and under the city charter the city could not be made liable in an action at law, the only remedy of the contractor being through the special assessment, was not well taken; (2) that the first contract having been properly let under the charter, and every thing done by plaintiff having been done under it, and this work and the materials for which this suit is brought having been taken into account in letting the second contract, which was let in due form on that basis, the present claim is not for work done or materials furnished outside the contract, and to permit a recovery for such work and materials as the city has appropriated and had the benefit of, would not infringe the charter provisions for a public letting to the lowest bidder; and (3) that the

objection that the claim had not been presented to the council before suit was brought, not having been made by the pleadings, could not be considered.—*Ibid.*

STRICT LEGAL DUTY.

See **MANDAMUS**, 3-5.

SUB-CONTRACTORS.

See **MONEY HAD AND RECEIVED**, 2, 3: **STATUTE OF FRAUDS**, 2.

SUBJECT TO MORTGAGE.

See **GUARDIAN SALES**, 5: **MORTGAGES**, 3.

SUBPOENA.

See **CONTRACTS**, 5, 6.

SUBSCRIBING WITNESS.

See **DEEDS**, 1.

SUBSEQUENT MORTGAGES.

See **FORECLOSURES**, 2-6.

SUBSEQUENT PURCHASERS.

See **CHattel Mortgages**, 2: **FORECLOSURES**, 8, 9: **REPLEVIN**, 1-3.

SUBSTITUTION.

See **PARTNERSHIP**, 3.

SUFFICIENCY OF DESCRIPTION.

See **FORECLOSURES**, 8, 9: **REPLEVIN**, 1-3.

SUIT FOR UNPAID TAXES.

See **TOWNSHIPS**, 1, 2.

SUPERINTENDENT.

See **CORPORATIONS**, 2.

SUPERINTENDENTS OF THE POOR.

1. The supervisors have no general authority to remove from office at their discretion superintendents of the poor; the statute (*Comp. L. 1871, § 477, Sub. 14*) giving them express authority to remove on the specific grounds of neglect or re-

fusal to report or to give bonds, and no other power of removal being conferred, a general authority to remove will not be implied as a consequence of the power to appoint.—*Mead v. Treasurer of Ingham County*, 416.

2. The general statute concerning removals (*Comp. L. 1871, ch. 11*) contains no provision applicable to superintendents of the poor. Our state system favors appointments for fixed periods and almost entirely rejects the policy of removals at will, and this rule of action appears to have been observed in the regulations concerning superintendents of the poor.—*Ibid.*
3. The supervisors having acted without authority in making the appointment of new officers to fill a supposed vacancy caused by their attempted removal of existing officers, their immediate recognition of the appointment as one to be respected, cannot be regarded as of any importance; they merely attributed validity to their own invalid act.—*Ibid.*
4. One of three superintendents having been a party to the controversy out of which resulted the attempted removal by the supervisors of the other two, and the appointment of others in their places, his recognition of the new appointees as his colleagues or co-superintendents, would be of little force to make out that they were officers *de facto*.—*Ibid.*
See MANDAMUS, 12, 13.

SUPERIOR COURT OF GRAND RAPIDS.

1. The county of Kent is held to be liable under the statute for the fees of jurors in the superior court of Grand Rapids.—*Covell v. Treasurer of Kent County*, 332.
2. It was competent for the legislature to require the county of Kent to pay the fees of jurors in said court.—*Ibid.*
3. The legislature had authority under the constitution to establish said superior court. The constitution (*Art. VI, § 1*) plainly reserves to the legislature the power to carve out of the judicial power vested in the other courts named such authority as it would be proper to confer upon city courts, and to create such courts for its exercise.—*Ibid.*
4. It is for the legislature to determine the extent of the authority to be given municipal courts, subject to the restriction that it must not exceed that which can properly pertain to a municipal court. It was not the intention of the constitution that every municipal court should possess both civil and criminal jurisdiction.—*Ibid.*

SUPERVISORS.

See MANDAMUS, 10, 11: REPRESENTATIVE DISTRICTS, 1, 2:
SUPERINTENDENTS OF THE POOR, 1-4; TAXATION, 10.

SUPERVISOR'S CERTIFICATE.

See TAXATION, 1.

SUPPLIES.

See STATUTE OF FRAUDS, 2.

SUPPORTED BY EVIDENCE.

See PRACTICE IN SUPREME COURT, 10.

SURETIES.

Sureties in a bond given to secure performance by their principal of future mercantile engagements, and in which no period of limitation of liability is fixed, who have notified the obligees that they will no longer be bound for future transactions, are held discharged from liability for transactions thereafter entered upon, where no change in circumstances by the obligees has occurred on the faith of a longer continuance of the suretyship, and they are not prejudiced by such withdrawal.—*Jeudevine v. Rose*, 54.

See CONTRACTS, 3: MORTGAGES, 18: PROMISSORY NOTES, 9.

SWORN ANSWER.

See EQUITY PLEADING AND PRACTICE, 6: SPECIFIC PERFORMANCE, 2.

TAKING BOOKS TO JURY-ROOM.

See PRACTICE IN CIRCUIT COURTS, 3, 4.

TAXATION.

1. Under a statute allowing three days for review of the assessment roll, where the sessions are not required to last later in the day than five o'clock in the afternoon, the fact that the supervisor's certificate to the roll is dated on the last review day, does not necessarily show that it was premature, for it would be competent for him to attach his certificate on that day and after the hour specified; and all reasonable presumptions must be indulged in favor of official regularity.—*Yelverton v. Steele*, 62.
2. The amount of state and county taxes levied in the several townships depending on the equalization of valuation required by the statute to be made by the board of supervisors, it is as important, as between the several townships, that this action should be taken, as is a separate valuation of estates, as between individuals; and failure to comply with this requirement invalidates the tax.—*Ibid.*

3. The statute requiring the action taken by the supervisors in this regard to be entered upon the records, informal action which is not recorded will not answer the requirement; conjecture is inadmissible where the statute requires a record.—*Ibid.*
4. An objection, that the tax on the face of the roll appears to be excessive, is not considered, in the absence of competent evidence what state tax was apportioned to the township, there being no basis for an estimate.—*Ibid.*
5. Where taxes have been regularly assessed and returned, the responsibility of the county to the state on account thereof is fulfilled, and the county is discharged from further duties.—*Auditor General v. Supervisors of Monroe County, 70.*
6. Under the tax system of this state all unpaid taxes which are returned as delinquent belong to the state, and the counties have no further concern with or control over them, except in case any tax is found to be illegal and is set aside by the proper state authority in the manner pointed out by law; and every dollar of taxes returned unpaid in due course of law is a payment to that extent of the debts due from the county to the state, and the accounting between county and state is upon this basis.—*Ibid.*
7. The provision in the tax law of 1869 (*Comp. L. 1871, § 1090*) directing lands remaining unsold for five years after they were bid off to the state to be sold for what they would bring, crediting the county for any excess, and charging it for any deficiency, is held not to be retrospective. While as a matter of future policy this provision might fairly be considered as a means of ultimate collection, by making the county a guarantor, not only of the validity of the taxes, but also of the marketable value of the security, and thus be within the title of the act, "to provide for the uniform assessment of property, and for the collection and return of taxes thereon," yet its purpose, if given retrospective effect, is different, and not within the purview of such a title.—*Ibid.*
8. The legal effect of this provision, if retrospective, is to authorize the state arbitrarily to shift off on the county its bad bargains in tax lands, and compel the county—not to take them at their cost,—but to make up the deficiency arising on the sale by the state itself, and over which the county has no control. And its result is to require those who have already paid their taxes, to be taxed over again for the default of others, who may in turn have profited by their own default, by bidding in their lands for less than was levied against them.—*Ibid.*
9. The state is not authorized to charge back to the county because of injunctions any taxes which have been returned as delinquent, until they have been rejected or held invalid by

some competent authority; though if the injunctions were issued under circumstances which left authority in the auditor general to reject them for illegalities, and he actually rejected them for adequate causes, the fact that he did not wait for a decree would not be important.—*Ibid.*

10. Where a sum of money has been lawfully voted to be raised by taxation for township purposes, the failure of the board of supervisors to direct its levy would not invalidate the action of the supervisor in spreading it upon his roll.—*Upton v. Kennedy, 215.*
11. The term "township expenses" is usually applied to the ordinary expenses of township government, and as commonly used would not cover many sums which it might be proper and even necessary that the township should raise for local purposes, as, for instance, school taxes, the mill tax for school purposes, or a tax to pay a judgment against the township; so that a finding that one thousand dollars of township taxes had been levied, and that five hundred dollars had been voted as a contingent fund, and that there was "no other record of any further sum being raised for township expenses" does not necessarily show that the levy was excessive.—*Ibid.*
12. A return of the township collector, of the failure to pay the taxes, which is neither signed by him nor verified by his oath, is held to be unofficial and of no legal value.—*Ibid.*
13. It is too broad a construction to put upon the statute (*Comp. L. 1871, § 1129*) to hold that wherever a deed appears to have been given for taxes some portion of which were legal and are not shown to have been paid or otherwise discharged, the title under the deed must be upheld. Some things besides a deed must necessarily be assumed as having been within the implications of the legislative requirement. The sale, to be upheld, must be understood to be a sale made as required by law, and effectuated by such a deed as the law contemplates. And there must be a lawful return to support the statutory sale and conveyance.—*Ibid.*
14. The real purport and effect of this statute is, that the sale shall not be void because one of the several taxes was illegal, or has been discharged, nor because a return cannot be found in the proper office, unless it is shown the return never existed.—*Ibid.*
15. The purposes had in view by this legislation were: (1) To provide that no error or irregularity in mere matter of form should invalidate a tax proceeding; (2) To do away with the legal rule which the decisions had previously established, that a sale for several taxes, one of which was illegal or had been paid, should be void; and (3) To abolish the rule that when a record was not to be found in the proper office it must be accounted for before it can be assumed that it ever

existed. For the first purpose the statute was not necessary, but the other two could not be accomplished without legislation.—*Ibid.*

See FINDING OF FACTS, 2: LEGISLATIVE AUTHORITY, 2: MANDAMUS, 4, 5, 10, 11.

TAX DEEDS.

See FINDING OF FACTS, 2: LEGISLATIVE AUTHORITY, 2: TAXATION, 14, 15.

TAXES.

Returned as delinquent: See TAXATION, 5-9.

See FORECLOSURES, 16: TOWNSHIPS, 1, 2.

TAX ROLL.

See TOWNSHIPS, 1.

TENDENCY OF EVIDENCE.

See CHARGE TO THE JURY, 4-6.

THEORY.

See CHARGE TO THE JURY, 2, 3.

THIRD PARTIES.

See AMENDMENTS, 3: FORECLOSURES, 11.

TIMBER.

See TRESPASS TO LANDS, 1-4.

TIME.

See ATTACHMENT, 10: CONTRACTS, 7: INSURANCE, 3, 4: STATUTE OF LIMITATIONS, 1: SURETIES: TAXATION, 1: TOWNSHIP DRAIN COMMISSIONER, 2, 3.

TIME ACCEPTANCES.

See WAIVER, 1, 2.

TITLE.

Of statutes: See REPRESENTATIVE DISTRICTS, 3: TAXATION, 7.

To office: See MANDAMUS, 12, 13.

See ATTACHMENT, 7-11: EQUITY JURISPRUDENCE, 1, 8: EVIDENCE, 7, 8: FRAUD, 1-5: GARNISHEE PROCEEDINGS: GROWING CROPS, 1-3: MORTGAGES, 16: SALES, 1-3.

TORTIOUS TAKING.

See EXECUTIONS, 2.

TORTS.

See ASSIGNMENT, 1, 2: IMPLIED PROMISE.

TOWN LOT.

See HOMESTEAD, 2.

TOWNSHIP CLERK.

See CERTIFIED COPY, 1, 2.

TOWNSHIP DRAIN COMMISSIONER.

1. Under the statute (*Comp. L. 1871, § 1793*) providing for an appeal to a justice of the peace from the action of the township drain commissioner, it is not every act or omission of the commissioner from which an appeal can be taken.—*Horner v. Biggam*, 243.
2. On *certiorari* to review proceedings on such appeal, the record not identifying any act of the commissioner as appealable, except it be action of which the finding of the jury is by the statute (*S. L. 1875, p. 170, § 1782*) made *prima facie* evidence, and the appeal having been taken more than a month after the action of the jury, the time fixed by the statute within which an appeal may be taken being ten days only, it was held the appeal was without jurisdiction.—*Ibid.*
3. The action of the commissioner upon the application to establish a drain being required under the statute to be taken before he issues a venire, an appeal complaining of the action of the commissioner in locating and establishing the drain, and which is not taken within ten days after the finding of the jury, must identify some subsequent action of the commissioner to which the appeal is applicable.—*Ibid.*
4. The appeal being unauthorized, and the action had by virtue of it being nugatory, the judgment of affirmance of the original proceedings, which had by lapse of time become under the statute final and unappealable, could work no injury to the appellants, and will not be disturbed on *certiorari* on their behalf.—*Ibid.*

TOWNSHIP EXPENSES.

See TAXATION, 11.

86 MICH.—61

TOWNSHIPS.

1. A suit for unpaid taxes will not lie in favor of a township, except in the case provided for by statute, where taxes on personalty have been returned unpaid for want of property on which to levy. The tax-roll is itself as complete and adequate as an execution on a judgment would be, if there are goods and chattels within the treasurer's jurisdiction.—*Staley v. Columbus*, 38.
2. Where a town treasurer has received from a tax-payer worthless highway orders in part payment of his taxes, receipting the taxes and returning them as paid, and in his settlement with the township board is allowed the amount thereof, the taxes are thereby paid, and any suit which is brought for the amount of the orders must be a private controversy between the treasurer and the party who paid them to him, and not a township action.—*Ibid*.

TOWNSHIP TAXES.

See TAXATION, 10-12.

TOWN TREASURER.

See SCHOOL DISTRICTS, 1-6.

TRANSFER OF TITLE.

See SALES, 1-3.

TREASURER.

See CORPORATIONS, 1, 2: SCHOOL DISTRICTS, 1-6: TOWNSHIPS, 1, 2.

TREBLE DAMAGES.

See TRESPASS TO LANDS, 1-4.

TRESPASS.

See ASSIGNMENT, 2: ATTACHMENT, 4-6: EXECUTIONS, 2.

TRESPASS TO LANDS.

1. In an action for trespass to lands and the cutting of timber, in which the plaintiff claims to recover treble damages under the statute (*Comp. L. 1871, §§ 6370-1*) the defendant is entitled under the plea of the general issue to give evidence that the trespass was involuntary and made under a *bona fide* claim of right, and is not required to give notice with his plea of his intention to introduce such evidence.—*Osburn v. Lovell*, 246.

2. The rule that where one relies upon a statutory exception not contained in the enacting clause of the statute, he must by his pleadings bring himself within the exception, is not always a rule of pleading, but is sometimes a rule of evidence only; and it goes no further in any case than to require the party relying upon the exception to present the facts in such form as the case requires.—*Ibid.*
3. Whatever in an action of tort would go in mitigation of damages may be given in evidence under the general issue.—*Ibid.*
4. Under a declaration containing a count for a common-law trespass and a count for the statutory trespass, where a general verdict of guilty is returned, it is not competent for the court to apply the verdict to the count under the statute and proceed to render judgment for treble the damages returned.—*Ibid.*

TRIFLING SUM.

See PRACTICE IN SUPREME COURT, 8.

TROVER.

See ASSIGNMENT, 1.

TRUNKS.

See FRAUDULENT CONVERSION, 1-3.

TRUSTEES.

See BANKS, 2-4: EQUITY JURISPRUDENCE, 3: FRAUD, 1: MORTGAGES, 10: WILLS, 1-5.

TRUSTS.

See BANKS, 2-5: WILLS, 1-5.

TWO PRINCIPALS.

See SALES, 2.

TWO SEPARATE DEEDS.

See FORECLOSURES, 29.

UNAUTHORIZED APPEAL.

See TOWNSHIP DRAIN COMMISSIONER, 4.

UNAUTHORIZED PURCHASES.

See SCHOOL DISTRICTS, 9.

UNDIVIDED INTERESTS.

See EJECTMENT, 2: EVIDENCE, 11: LEASES, 5-7: REPLEVIN, 4.

UNITED STATES COURTS.

See EXECUTIONS, 1, 2: PLEA IN ABATEMENT, 1.

UNITED STATES MARSHAL.

See PLEA IN ABATEMENT, 1.

UNLAWFUL SALES.

See PROHIBITORY LIQUOR LAW, 1-3: PROMISSORY NOTES 1-3:
SET-OFF.

UNOCCUPIED.

See INSURANCE, 5-9.

UNRECORDED DEED.

See EVIDENCE, 7, 8: FRAUD, 1-4: MORTGAGES, 14.

USE AND OCCUPATION.

See DECLARATION, 7.

USE FOR AGRICULTURAL PURPOSES.

See LEASES, 4.

VACANCY.

See INSURANCE, 5-9.

VACATING JUDGMENT.

See JUSTICE'S COURTS, 1: MANDAMUS, 2.

VACATING ORDER TO HOLD TO BAIL.

See PRACTICE IN CIRCUIT COURTS, 5.

VALUATION.

See TAXATION, 2-4.

VALUE.

Of premises: See EJECTMENT, 1.
See EVIDENCE, 12, 17.

VARIANCE.

See FORECLOSURES, 1, 7.

VENDOR'S LIEN.

1. Where a person claiming to hold a vendor's lien upon lands has mingled his claim for purchase money with a claim for the price of personal property, in a single judgment, in such manner as to render it impossible to determine how much of the judgment represents the price of the land and how much the value of personal property, and under this judgment proceeded to execution levy and sale of the premises in question, his lien as vendor for the unpaid purchase money is lost.—*Clark v. Stilson*, 482.
 2. A vendor's lien is in the nature of an equitable mortgage; and under the statute (*Comp. L. 1871, § 4667*) the equity of redemption cannot be sold on execution for the satisfaction of the mortgage debt; and an execution sale of the premises upon a judgment for the purchase price would seem to negative the claim of lien.—*Ibid.*
- See FRAUD, 6.

VERDICT.

See TRESPASS TO LANDS, 4.

VERIFICATION.

See TAXATION, 12.

VILLAGE LOT.

See HOMESTEAD, 2.

VIOLATION OF CONTRACT.

See CONTRACTS, 4-6.

VOIDABLE CONTRACTS.

See INFANTS, 4.

VOIDABLE SECURITIES.

See CONTRACTS, 15.

VOID APPOINTMENT.

See SUPERINTENDENTS OF THE POOR, 3, 4.

VOID DEED.

See HUSBAND AND WIFE, 1-4.

VOID SALE.

See EQUITY JURISPRUDENCE, 9.

VOTE OF THE PEOPLE.

See MANDAMUS, 10.

WAGES.

See ASSIGNMENT, 4-6: REQUESTS TO CHARGE, 1: STATUTE OF LIMITATIONS, 1.

WAIVER.

1. A boom company having taken time acceptances for its claim for services upon rafts of logs delivered to the owners thereof, this would give the latter the right to demand and receive the residue of their logs released from any lien for services upon the rafts delivered. There being no agreement or understanding that the logs on hand might be retained as security for the future payment of a demand not then payable, such an agreement cannot rest in implication. And the lien being thus once lost could not be revived by the maturing of the acceptances; a lien once waived is permanently lost.—*Au Sable River Boom Co. v. Sanborn*, 358.
 2. Even if as between the boom company and the original log owners there could be any question that the taking of such acceptances would be a waiver of any lien therefor on the remaining logs, there could be none as between the company and a third person to whom the property has been sold without notice of any claim for services in respect to logs previously delivered. If one by his purchase acquires an immediate right to remove his property, he cannot lose it by any subsequent default of his vendor.—*Ibid.*
- See FORECLOSURES, 31: INSURANCE, 3, 7-9: WITNESSES, 2.

WAIVING THE TORT.

See IMPLIED PROMISE: STREET PAVING, 5.

WARDS.

See GUARDIAN SALES, 1-6.

WARRANTS.

See ESTATES OF DECEASED PERSONS, 1: MANDAMUS, 10-12: SCHOOL DISTRICTS, 1-6.

WARRANTY DEED.

See FORECLOSURES, 19, 20.

WEIGHT OF EVIDENCE.

See CHARGE TO THE JURY, 4: PRACTICE IN SUPREME COURT, 1, 10.

WHEAT IN SHOCKS.

See REPLEVIN, 4.

WIDOW.

See DOWER.

WIFE.

See CONTRACTS, 8-16: DELIVERY: DOWER: HUSBAND AND WIFE, 1-4: LINE FENCES, 2: MARRIED WOMEN, 1, 2: PARTNERSHIP, 2.

WILLS.

1. A bequest to a school district board named, and their successors, in trust to invest at interest and expend the interest annually for purchasing and adding to a school library, such books to be selected as will be suitable for people of all ages and classes in the district, and so used by them under proper rules and regulations as shall best promote the interest of education, general literature and morality, is sustained as a valid bequest.—*Maynard v. Woodard*, 423.
2. The intended beneficiaries and the managers are persons known to the law as competent to take and use all property destined for the legitimate uses of school districts, when sufficiently designated and granted.—*Ibid*.
3. Libraries must certainly be considered within the proper range of school apparatus, and the design of this bequest cannot be held to be in conflict with public school purposes.—*Ibid*.
4. The bequest is for a purpose coming within the range of charities, but the doctrines applied to imperfectly defined gifts and trusts are not involved; the property, the trusts, the beneficiaries and the trustees or managers, are all definitely specified; the only discretion involved is that of the lawful administrators of the district, and is a corporate discretion; and there is no room for technical criticism upon the question whether the bequest is to the district or to the board; the intent is not obscure.—*Ibid*.
5. There is nothing in our laws which cuts off public corporations from accepting benevolent offerings to enable them to extend their usefulness and benefit their people by enlarging their opportunities for culture and refinement without mul-

tiplying or increasing their burdens; and a school district may lawfully accept a bequest of a fund to be invested and the interest expended in purchasing and keeping up a district library, and it is legally capable of administering such a trust.—*Ibid.*

See DOWER, 1.

WITHDRAWAL.

Of jury: See PRACTICE IN CIRCUIT COURTS, 1.

See DECLARATION, 1-5: SURETIES.

WITNESSES.

1. The judge determines a witness' competency unless it depends on a disputed question of evidence, which he may refer to the jury.—*Hartford Fire Ins. Co. v. Reynolds*, 502.
2. Disclosures to an attorney in the presence of an outside party are not privileged; and where the client has himself testified as to conversations with his attorney, it seems this may operate as a waiver of the privilege to that extent.—*Ibid.*

WORTHLESS ORDERS.

See TOWNSHIPS, 2.

WRITTEN ADMISSIONS.

See CORPORATIONS, 1, 2.

WRITTEN CONTRACTS.

See SPECIFIC PERFORMANCE, 1-4.

YARD.

See CURTILAGE.

YIELDING.

See RAPE, 2-4.

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